34905

MARTIN GORSKI,
Appellee,

vs.

MAX UZELAC et al.,
Appellants.
On Appeal of MAX UZELAC.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

263 I.A. 635

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant, Max Uzelac, seeks to reverse an order entered by the Superior court of Cook county on December 8, 1930, by which his motion for leave to file his appearance, answer and cross-bill was denied.

The record discloses that November 25, 1929, complainant filed his bill in the Superior court of Cook county to foreclose a mortgage on certain real estate. Max Uzelac was made a party defendant. November 30, 1929, at his residence in Gary, Indiana, he was served with notice advising him of the pendency of the suit and that the summons in the case was returnable on the first day of the term of the Superior court of Cook county to be held at the Court House in Cook County, on the first Monday of January, 1930. At the same time he was also served with a copy of the bill of complaint. February 28, 1930, the chancellor before whom the cause was pending in the Superior court of Cook county signed a default memoranda from which it appears that certain of the defendants had been personally served, that others had been served by publication and "Service by copy of Bill and Notice of Commencement of Suit on Max Uzelac and Anna Uzelac, his wife," and in accordance with the practice of the Superior court the clerk attempted to spread an order of record in conformity with the default memoranda signed by the Chancellor, but in that order no mention was made of the defendants Max Uzelac or Anna Uzelac,

84908

MARTIN [illegible],
Appellee,

vs.

MAX UZELAC et al.,
Appellants.

On Appeal of MAX UZELAC.

[illegible] APPEAL FROM THE SUPERIOR COURT
OF COOK COUNTY.

[illegible]

[illegible] MR. [illegible] JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT:

By this appeal defendant, Max Uzelac, seeks to reverse an order entered by the Superior Court of Cook County on December 8, 1970, by which his motion for leave to file his appearance, answer and cross-bill was denied.

The record discloses that November 28, 1970, complainant filed his bill in the Superior Court of Cook County to foreclose a mortgage on certain real estate. Mr Uzelac was made a party defendant. November 30, 1970, at his residence in Gary, Indiana, he was served with notice advising him of the pendency of the suit and that the summons in the case was not returnable on the first day of the term of the Superior Court of Cook County to be held at the Court House in Cook County, on the first Monday of January, 1971. At the same time he was also served with a copy of the bill of complaint. February 2, 1971, the chancellor before whom the cause was pending in the Superior Court of Cook County signed a default nonsuit. Two weeks it appears that certain of the defendants had been personally served, but others had been served by publication and "service by copy of bill and notice of commencement of suit on Max Uzelac and Anna Uzelac, his wife," and in accordance with the practice of the Superior Court the clerk attempted to spread an order of record in conformity with the default nonsuit signed by the chancellor, but in that order no mention was made of the default of Max Uzelac or Anna Uzelac,

his wife. The cause was referred to a master on the same day, February 28, 1930. The master took the proofs and made up his report dated December 1, 1930. December 8, 1930, Max Uzelac filed his verified petition in the foreclosure suit setting up inter alia that the mortgage sought to be foreclosed was fraudulent and void. The petition also contained the following: "Your petitioner further represents that no default order has ever been entered against Max Uzelac so far as he is able to determine by the examination of the records," and the prayer was that he be allowed to enter his appearance and file his answer and cross-bill instanter. On the same day, December 8, 1930, the court entered an order reciting that the cause came on to be heard on motion of the complainant to amend the record so as to show that the Uzelacs had been ordered defaulted on February 28, 1930. The court in the order finds "That the original default memorandum signed by this court on February 28, 1930, shows that the court defaulted Max Uzelac and Anna Uzelac, his wife, after due service of copy of the bill and notice of commencement of suit," and the court further found that through mistake or misprision of the clerk the names of Max Uzelac and Anna Uzelac, his wife, had not been shown in the order as written up by the clerk. Therefore the orders written did not speak the truth as shown by the memoranda of default signed by the court February 28, 1930, and it was ordered and decreed that the record be corrected to speak the truth so as to show that Max Uzelac and Anna Uzelac, his wife, were defaulted February 28, 1930. On the same day the court entered another order denying Max Uzelac's motion for leave to file his appearance, answer and cross-bill, from which order Max Uzelac prayed and was allowed an appeal and he has perfected his appeal in accordance with the order allowing it by filing his bond.

The court having found that Mr. Dealing had been served with notice of the commencement of the suit and with a copy of the bill, the answers of Mrs. Dealing was returnable in the January term of the Superior Court beginning on the first Monday in January, 1890, and there being no denial of this service by her demurrer, and it further appearing that the - executor had signed a default memorandum ordering the default of her Monday 22, 1890, and the cause having not been returned - the master who took evidence was made up the court dated December 1, 1890, it is clear there was no error in the commissioner at his time refusing to permit Dealing to file his answer and cross-bill. There was certainly no abuse of discretion. In fact, from the showing made by Dealing in his petition, the action of the Commissioner in denying Dealing's motion was the only order that could consistently be entered. The varying on the defendant, Dealing, also a notice and a copy of the bill was to commence with the provisions of Sec. 14 of the charter of our Kentucky so Commonwealth. (Sec. 14, chap. 22, Updike's Laws.)

The order of the Superior court appealed from is affirmed.

Affirmed.

Mosely and Mitchell, J.J., concur.

35106

MARTIN GORSKI,
Appellee,

vs.

MAX UZELAC et al.,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

263 I.A. 625

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

By this appeal Max Uzelac and S. G. Savich seek to reverse a decree entered in a mortgage foreclosure proceeding. Max Uzelac and S. G. Savich were defendants to the bill of foreclosure. Uzelac was defaulted, Savich filed his answer and cross-bill. The case was referred to a master in chancery who took the evidence and made up his report recommending a decree of foreclosure. Savich filed objections to it which were overruled by the master. They were ordered to stand as exceptions and were overruled by the chancellor and the decree of foreclosure entered. The last paragraph of the decree is as follows: "And it is further ordered that the defendant and cross-complainant, S. G. Savich be and is hereby granted an appeal to the Appellate Court of Illinois, First District, upon the executing and filing with the approval of this court, an appeal bond in the sum of One Thousand ($1,000.00) Dollars within 30 days hereafter." The decree was entered January 6, 1931, and on January 24, 1931, there appears in the record the appeal bond of Max Uzelac as principal and certain other parties as sureties, the bond being for $1,000, reciting that the decree of foreclosure entered January 6, 1931, is sought to be reversed. This is the only bond in the record.

It is obvious that the case is not properly before us. The only one who appealed from the decree of foreclosure was

Savich and he filed no bond. Uzelac was defaulted and prayed no appeal. The right to prosecute an appeal from a judgment or decree is purely statutory and the appeal must be taken in conformity with the order of court allowing it. Lingle v. City of Chicago, 210 Ill. 600.

The attempted appeal before us not being in conformity with the statute, sec. 92 of the Practice act, it is dismissed. Lingle v. City of Chicago, supra.

APPEAL DISMISSED.

McSurely and Matchett, JJ., concur.

Zwick and he filed no brief. Jesus Ten dismissed and charged no appeal. The right to prosecute an appeal from a judgment or decree is purely statutory and the appeal must be taken in conformity with the order of court allowing it. Lubale v. City of Lusaka, SCZ Ltd. No.

The attempted appeal before us no. brief, in conformity with the statute, sec. 22 of the Principal act, it is dismissed. Lubale v. Lit. of Lusaka, supra.

A. M. DALEY, J.

Motwerly and Mitchell, JJ., concur.

35215

PAUL SHULTE,
Plaintiff in Error,

vs.

A. C. ALLEN,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

263 I.A. 623

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover $2,500 claimed to have been money loaned by plaintiff to defendant through fraudulent representations of the defendant, none of which had been repaid. There were two items that made up plaintiff's claim, one for $1,500 and one for $1,000. The defendant denied that he was guilty of fraud or misrepresentation and denied any liability. There was a trial before the court without a jury, and at the close of plaintiff's case there was a finding and judgment in defendant's favor and plaintiff appeals.

Plaintiff's theory of the case was that the defendant was president of an oil company that was in need of funds to complete an oil well in Okalhoma and sought out plaintiff to loan defendant $1,500 for this purpose, defendant offering to secure the payment of the $1,500 by a mortgage on a drilling rig and equipment belonging to the oil company; that defendant fraudulently represented the value of the security, which was of little value, and that plaintiff was entitled to recover back the $1,500, which was unpaid. As to the $1,000 item, plaintiff's theory was that the defendant needed the $1,000 and sold the plaintiff four-fifths interest in ten acres of land which was held under a lease, the value of which was fraudulently represented so that plaintiff loaned $1,000, none of which was repaid.

The theory of the defendant, as shown by his affidavit

SEAL:

PAGE, APPELLANT,

Negligence in car,

vs.

R. E. LUCAS,

Defendant in error.

[illegible]

[illegible]

[illegible]

[illegible] cover $2,000 alleged to have been [illegible] by [illegible] defendant [illegible] [illegible] none of [illegible] had been [illegible]. [illegible] plaintiff's claim, one [illegible] [illegible] not denied that no [illegible] [illegible] denied any liability. [illegible] a jury, and at the close of [illegible] and judgment in defendant's [illegible].

Liability [illegible]

was predicated [illegible] complete at fault [illegible] defendant, [illegible] payment of [illegible] [illegible] negligence [illegible] recovered the value of the [illegible], which was of little [illegible] and that plaintiff [illegible] was injured. [illegible] the defendant needed [illegible] interest in the [illegible] value of a [illegible] [illegible] loaned [illegible] $1,000, more or [illegible].

The testimony of the [illegible]

of merits, was that he made no misrepresentation to plaintiff; that he did not get the $1500 for himself but obtained it for the oil company; that plaintiff and defendant were two of the largest stockholders of the company; that the company was in need of money and that the money was obtained from plaintiff for and on behalf of the oil company. Other details of the defense are set up which we think it unnecessary to notice here. As to the $1,000 item, defendant denies any fraud was practiced but avers on the contrary that plaintiff was sold a certain part of a leasehold interest in ten acres of land; that the money was not borrowed by defendant.

On the trial of the case it appeared from the evidence that the leasehold interest, a certain part of which was conveyed to plaintiff for the $1,000, was owned by defendant and Frederick W. Hill, and when this appeared counsel for defendant objected that there was a non-joinder of the parties defendant - that Hill should be made a party, and this view seems to have been taken by the learned trial Judge.

Plaintiff testified that he loaned the $1,500 to the defendant and that some nine or ten months later he saw the defendant and said he wanted his money; that defendant said "they were going to sell the rig and give me my money back." We think this made a prima facie case as to this item. As to the $1,000 item, the objection of the defendant on the trial was sustained on the ground of the non-joinder of Hill. Plaintiff's evidence was to the effect that he had loaned the money to the defendant, and the fact that the leasehold interest was to be conveyed by the defendant and Hill did not render the transaction one between plaintiff on the one hand and the defendant and Hill on the other. Plaintiff's testimony is that he loaned the money to defendant.

The defendant contends that plaintiff's statement of

of merits, was that we made no misrepresentation to plaintiff; that he did not get the $[illegible] for himself but obtained it for the oil company; that plaintiff and defendant were two of the largest stockholders of the company; that the company was in [illegible] and of money and that the money was obtained from plaintiff for and on behalf of the oil company. Other details of the dispute are set up which we think it unnecessary to notice here. As to the $1,000 item, defendant denies any fraud was practiced and avers on the contrary that plaintiff was held a certain part of a lease[illegible] interest in ten acres of land; that the money was not borrowed by defendant.

In the trial court the case is presented upon the evidence that the Lessendig interest, a certain part of which was conveyed to plaintiff for the $1,000, was owned by defendant and Frederick V. Gill, and when this assumed command for interest obtained that there was a non-joinder of the proper defendant - that Gill should be made a party, and this view seems to have been taken by the learned trial judge.

Plaintiff testified that he loaned the $1,000 to the defendant and that some time or ten months later he saw the defendant and said he wanted his money; that defendant said "they were going to sell the rig and give me my money back." To this this made a prima facie case as to this item. As to the $1,000 item, the objection of the defendant on the trial was sustained on the ground of the non-joinder of Gill. Plaintiff's evidence was to the effect that he had loaned the money to the defendant, and the fact that the Lessendig interest was to be conveyed by the defendant and Gill did not render the transaction one between plaintiff on the one hand and the defendant and Gill on the other. Plaintiff's testimony is that he loaned the money to defendant.

The defendant contends that plaintiff's statement of

claim did not state a cause of action and therefore the judgment should be affirmed. The statement of claim informed the defendant of the nature of his claim, and it is obvious that it was sufficient in this respect because plaintiff filed a detailed affidavit setting up his defense. We think there ought to be a retrial of this case where all the facts could be developed so that a hearing may be had upon the merits of the case.

For the reasons stated the judgment of the Municipal court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

McSurely and Matchett, JJ., concur.

[illegible]

34902

WALLACE A. BROWN,
Appellee,

vs.

CHICAGO JUNCTION RAILWAY COMPANY and CHICAGO RIVER & INDIANA RAILROAD COMPANY, Corporations,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

263 I.A. 635

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment of $15,000 entered upon the verdict of the jury upon the trial of an action of trespass on the case, wherein plaintiff sought damages for injuries received when struck by one of defendants' freight cars while plaintiff was walking on defendants' right of way.

The declaration consisted of eight counts, but the court instructed the jury to disregard all the counts except those alleging that the injury was wilfully and wantonly inflicted upon plaintiff. By proper motions the court was requested to instruct the jury to find the defendants not guilty as to the wilful and wanton counts, which the court refused to do. Was there any evidence tending to support these counts?

The accident happened about seven o'clock the evening of April 15, 1929, in the city of Chicago. Plaintiff's place of employment was on Iron street near 36th street. Two city blocks west of Iron street is Ashland avenue. Both streets run north and south. Defendants' right of way is about 60 feet wide, running from Iron street to Ashland avenue. Two railroad tracks run east and west along the full length of this right of way with spur tracks leading off into industries adjacent thereto. As the two tracks near Ashland they unite into a single track.

On the evening in question plaintiff with a companion, Leonard Wagley, left their place of employment on Iron street and

34902

WALLACE A. BROWN,
appellee,

vs.

CHICAGO JUNCTION RAILWAY COMPANY
and CHICAGO RIVER & INDIANA
RAILROAD COMPANY, Corporations,
appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MORAN DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment of $15,000 entered upon the verdict of the jury upon the trial of an action of trespass on the case, to recover statutory damages for injuries received when struck by one of defendants' freight cars while plaintiff was walking on defendants' right of way.

The decision has consisted of eight counsels, but the court instructed the jury to disregard all the counts save of those alleging that the injury was wilfully and wantonly inflicted upon plaintiff. By proper motions the court was then also to instruct the jury to find the defendants not guilty [illegible] and wanton counts, which the court refused to do. Can there be any evidence tending to support these counts?

The accident happened about seven o'clock the evening of April 15, 1928, in the city of Chicago. Plaintiff's place of employment was on Iron street near Ohio street. In city blocks west of Iron street is Halsted avenue, which runs north and south. Defendants' right of way is about 60 feet wide, running from Iron street to Halsted avenue. Two railroad tracks run east and west along the full length of this right of way with spur tracks leading off to industrial buildings. In the two tracks near Halsted there were [illegible] cars.

On the evening in question plaintiff with a companion, Leonard Bagley, left their place of employment on Iron street and

started westward along this right of way, walking on a cinder path between the two tracks. After going some distance they met a locomotive headed east pulling cars which, they testified, were moving very slowly. After the two men had walked beyond the last car of the train it stopped and switching operations began. The train would back westward, a car would be uncoupled, the locomotive would stop and the car would continue in a westerly direction. Witnesses described this as "kicking" the car. At l ast three cars had been thus switched or "kicked" before the car which caused the accident was sent west. There is some argument as to whether these three cars had been "kicked" west past the two men and within a few feet of them before the accident happened, but the uncontradicted evidence of the train crew is to the effect that at least three of the cars were "kicked" toward the west. Plaintiff and Wagley continued west, coming to the place where the north track curved south to join the south track. When they came to this point Wagley, who was walking six feet ahead of plaintiff, went across the north track. Plaintiff followed Wagley and when he was about the center of the track an unattended, unlighted car which had been "kicked" to the west struck him and ran over his leg.

Plaintiff and Wagley testified it was very dark. Plaintiff could see the first rail of the track, but not the second. Wagley said he could see about three feet ahead of him. When Wagley had crossed the track where the accident happened he was about six feet ahead of plaintiff and saw the car strike him. He went to the assistance of plaintiff, who was shouting loudly, and members of the train crew came to his assistance and called an ambulance which took plaintiff to the hospital. Plaintiff and Wagley say that the locomotive was about 200 feet east of the place of the accident. Wagley testified that it made a noise as they passed it and they could hear "the engine chugging." There were headlights on the

started backward slow [illegible] right on [illegible], [illegible] a [illegible] between the two trucks. After [illegible] [illegible] [illegible] a locomotive headed east pulling [illegible] cars which, they realized, were moving very slowly. After the two men had [illegible] beyond the [illegible] of the train it stopped and motionless continued on. [illegible] would back westward, [illegible] car would be uncoupled, the locomotive would stop and the car would continue on a [illegible] [illegible]. Witnesses described this as "[illegible]" the car. [illegible] cars had been thus switched or "kicked" before the car which caused the accident was [illegible] west. There is some [illegible] as to [illegible] these three cars had been "kicked" west [illegible] the two [illegible] a few feet of them before the accident happened, but [illegible] [illegible] evidence of the train crew is [illegible] effect that [illegible] three of the cars were "kicked" toward the west. Flaherty and Wagley continued west, coming to the [illegible] the [illegible] with the curved south to join the south track. When [illegible] point Wagley, who was walking his [illegible] of [illegible], [illegible] across the north track. Flaherty followed Wagley [illegible] the [illegible] the center of the track [illegible], [illegible] [illegible] "kicked" in the west [illegible] [illegible] [illegible].

Flaherty and Wagley [illegible] [illegible] [illegible].

Flaherty could see the first car of the train, but not the [illegible]. Wagley said he could see [illegible] that [illegible] [illegible]. [illegible] Wagley had crossed the track where the accident [illegible] [illegible] but six feet ahead of Flaherty and saw the car [illegible] [illegible]. [illegible] [illegible] [illegible] Flaherty, who was [illegible] [illegible], [illegible] of the train crew came to his assistance [illegible] [illegible] [illegible] took plaintiff to the hospital. Plaintiff and Wagley can [illegible] locomotive was about 300 feet east of [illegible] of the accident. Wagley testified that it made a noise [illegible] [illegible] could hear "the engine chug, chug." [illegible] were headlights on the

engine, but none on the rear of the train. Both men testified that they looked in both directions and saw nothing before they crossed the tracks. Plaintiff was familiar with the tracks and had seen switching there in the mornings and evenings as he came to and from work.

None of the train crew saw either of the men prior to the accident. There were no other persons walking on this right of way at the time. There was considerable testimony that this passageway was used by workmen in going backward and forward at eight o'clock in the morning and at five o'clock in the evening to and from work. There is no evidence that the place was used as a passageway after dark. One of plaintiff's witnesses testified that he never saw anyone walking through there after dark.

Plaintiff lived at 6329 Ashland avenue and he could have reached Ashland avenue, where he customarily took the street car, either by going north on Iron street, which was paved and lighted, to 35th street, or could have walked south on Iron street to 37th street and walked westward on 37th street to Ashland avenue.

We do not think it important to determine whether plaintiff at the time in question was a licensee or a trespasser. Whatever he was, the railroad company owed him no duty except to refrain from wilfully and wantonly injuring him, and this was true even if the right of way had been used as a passageway by a great number of people for a considerable length of time. Among the cases supporting this proposition are Illinois Central R. R. Co. v. Godfrey, 71 Ill. 500; Blanchard v. L. S. & M. S. Ry. Co., 126 Ill. 416; Illinois Central R.R.Co. v. O'Connor, 189 Ill. 559; James v. I. C. R. R. Co., 195 Ill. 327; I. C. R. R. Co. v. Eicher, 202 Ill. 556; Cunningham v. I. St. L. & W. R. R. Co., 260 Ill. 589; Morgan v. New York Central R. R. Co., 327 Ill. 339.

engine, but none on the rear of the train. Not one testified that they looked in both directions was the motion, before they crossed the tracks. Plaintiff was familiar with the tracks and had seen switching there in the morning and evenings on a near by iron work.

None of the train crew saw signs of the man prior to the accident. There were no clear rays to reflect on his right of way at the time. There was conflicting testimony over this passageway was used by workmen in going backward and forward at eight o'clock in the morning and at five o'clock in the evening to and from work. There is no evidence that the path was used as a passageway after dark. The of plaintiff's witnesses testified that he never saw anyone walking through there after dark.

Plaintiff lived at 6358 Medford Avenue. He could have reached Medford Avenue, which is about eight blocks from the present day, either by going north on Lake Street, which was paved at Medford, to 38th Street, or could have taken a car in Fort Street to 37th Street and walked westward on 37th Street to Medford Avenue.

We do not think it important to decide the whether plaintiff or the line in question was a licensee or a trespasser. Whatever he was, the railroad company owed him no duty except to refrain from willfully and wantonly injuring him, and this was true even if the right of way had been used as a passageway by a great number of people for a considerable period of time. Among the cases supporting this proposition are Illinois Central R. R. Co. v. Godfrey, 74 Ill. 5; Kinnaman v. [illegible], 19 Ill. App. 1[illegible]; Illinois Central R. R. Co. v. Cooper, 18 Ill. 268; Dyer v. I. C. R. R. Co., 195 Ill. 487; [illegible] v. [illegible] Co. v. Glover, 2[illegible] Ill. 5[illegible]; Cunningham v. [illegible], 20 Ill. App. 5[illegible]; Gorman v. New York Central R. R. Co., 347 Ill. 17[illegible].

In I. C. R. R. Co. v. O'Connor, 189 Ill. 559, it was shown that a number of persons had for several years been in the habit of crossing defendants' right of way from the foot of 25th street to reach the lake for bathing, fishing, etc., and that this was known to the railroad company and to the employees on its trains. Plaintiff, while crossing, was struck by a car which was backing northward. There was much evidence as to whether ordinances as to speed and lights had been violated. The court, however, said:

> "A railroad company, in the operation of its trains, owes no duty to a trespasser upon its right of way or tracks except that it will not wantonly or wilfully inflict injury upon him, and we have frequently held that the mere fact that signals are required by statutes and ordinances are not given, even though those operating its trains may have knowledge of the fact that persons have been in the habit of crossing its tracks or walking upon them at places other than public crossings, or public places, will not amount to proof of wilful and wanton disregard of duty toward such trespassers."

To the same effect are James v. I. C. R. R. Co., 195 Ill., 327; I. C. R. R. Co. v. Eicher, 202 Ill. 556.

In Reice v. C. & A. R. R. Co., 254 Ill. 595, and again in Morgan v. New York C. R. R. Co., 327 Ill. 339, the rule is stated that the servants of the railroad company owed the trespasser the duty of not wilfully and wantonly injuring him "after they had notice of his presence in a place of danger." As we have stated, the train crew testified that none of them saw plaintiff or Wagley before the accident. Counsel for plaintiff strenuously argue that the conductor gave some testimony which might be construed as indicating that he saw one of the parties. His statement was, "I did not know there was a man down on those tracks as he was coming west. I do not know whether or not there was a man there;" that "when we went up" he saw "somebody up in the headlights," but whether a watchman or who it was he could not say. It is evident that the witness referred to some one east of the locomotive who was in the rays of the headlights. It should be noted that Wagley, although

In *[illegible] v. [illegible]*, 100 [illegible], 1[illegible], it was shown that a number of persons had for several years been in the habit of crossing railroad tracks of any from the fear of being struck to reach the line for a train, Plaintiff, [illegible], was not this was known to the railroad company and to the employees on the trains. Plaintiff, while crossing, was struck by a car which was backing northward. There was much evidence as to whether ordinances as to speed and lights had been violated. The court, however, said:

> "A railroad company, in the operation of its trains, owes no duty to a trespasser upon its right of way or cross ways [illegible] it will not wantonly or willfully inflict injury upon him, and we have frequently held that the mere fact of such slightly trespassing by strangers and children [illegible] these operating the trains may have knowledge [illegible] the fact that persons have been in the habit of crossing its tracks or walking upon them at places other than public crossings, or public places, will not amount to proof of willful [illegible] a disregard of duty toward such trespassers."

To the same effect are [illegible] *[illegible]*, 1[illegible] [illegible], 1[illegible]:

[illegible] Co. v. Stout, [illegible] [illegible] 1[illegible].

In *[illegible] v. [illegible]*, [illegible] [illegible], 1[illegible] [illegible] in *[illegible] v. New York [illegible]*, [illegible] [illegible], 1[illegible] [illegible] that the servants of the railroad company owed the trespasser no duty of a willful, or wanton injury. In "other words had notice of his presence in a place of danger." [illegible] the track crew testified that none of them saw plaintiff or "spied before the accident. Counsel [illegible] "willful" wrongfully [illegible] that the conductor gave some testimony which might be construed as indicating that he saw one of the [illegible]. [illegible] "I did not know there was a man down on the track or he was on the west. I do not know whether or not there was a [illegible]." That "when we went up" he saw "somebody up in the highlights," but whether a woman or who it was he could not say. It is evident that the witness referred to some one, one of the [illegible] was in the rays of the headlights. It could be [illegible] enough

only a few feet from plaintiff, did not notice that he was in a position of peril. Wagley testified that he could see just about three feet ahead of him. Plaintiff did not look back to see what the locomotive was doing or whether it was about to stop. It should also be noted that plaintiff testified that before he stepped between the rails he looked in both directions and saw nothing and heard nothing. This story seems incredible, but if neither plaintiff nor Wagley could see but three feet away, it is self-evident that none of the crew saw either of these men.

There is no evidence tending to support the charges that the injury was wantonly and wilfully inflicted upon plaintiff, and it was error to refuse to give an instruction to this effect. For the reason that, in law, plaintiff is not entitled to recover, the judgment will be reversed but the cause will not be remanded.

REVERSED BUT NOT REMANDED.

O'Connor, P. J., and Matchett, J., concur.

FINDING OF FACT.

We find that there is no evidence in the record tending to support the charge in plaintiff's declaration that defendants were guilty of wilful and wanton conduct in the moving of their cars at the time and place in question.

34915

GRACE JONES,
Appellee,

vs.

BOSTON STORE OF CHICAGO,
a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant by this appeal seeks the reversal of a judgment against it for $18,000 entered upon the verdict of a jury in an action for compensation for personal injuries received by plaintiff while she was a passenger in one of defendant's elevators.

As the amount of the verdict, together with prejudicial errors upon the trial, necessitates a reversal and another trial, we shall narrate only briefly the circumstances.

Plaintiff at the time of the accident was a housewife, fifty-four years of age, living with her husband and family. She was shopping in the defendant's store, accompanied by a boy, John Quinlinen, twelve years of age. She was on the seventh floor of defendant's store and an elevator going down stopped at the floor to allow her and the boy to descend. The elevator operator opened the door and the boy stepped in first. There was evidence tending to show that, as plaintiff stepped in with her right foot in the car, the elevator suddenly commenced to ascend, throwing plaintiff on her right knee with her left leg extended behind her, which was caught, and the elevator suddenly dropped down, catching the same foot a second time. Her left leg and ankle were crushed between the elevator cage and the floors.

The first count of plaintiff's declaration alleged that the defendant through its elevator operator carelessly and

negligently and without warning caused the elevator to be suddenly and violently moved so that plaintiff was caught between it and the floors of the building. The second count alleged that the elevator operator recklessly and wantonly caused the elevator to be suddenly and violently moved.

Defendant first argues that the court improperly refused an instruction to the effect that the plaintiff could not recover under the second count of her declaration, as there was no evidence of wanton or wilful carelessness on the part of defendant. The court properly refused this instruction. There have been many cases attempting to define wanton and wilful conduct in personal injury cases. One of the elements stated in all the cases is that such conduct imports a consciousness that an injury may probably result from the act done and a reckless disregard of the consequences. Brown v. Illinois Terminal Co., 319 Ill. 326. See also opinion in Mosko v. O'Donnell, 260 Ill. App. 544, where one of the elements of wilful and wanton conduct in this connection is stated as, "Carelessness so gross in its nature as to indicate a mind reckless and regardless of consequences. (Bremer v. Lake Erie & Western R. Co., 318 Ill. 11.)" Plaintiff's testimony was to the effect that as she "stepped in" the operator started the elevator up; it then started down and "jerked my foot again;" that the operator "moved the car the minute I stepped." John Quinlinen testified that the elevator started upward as plaintiff "was just starting to get into the elevator. She was half-way in." These and other circumstances were proper to be considered by the jury in order to determine whether the elevator operator was so grossly careless as to be guilty of wilful and wanton conduct resulting in injury to plaintiff. In a motion of this sort the only question the court has to determine is whether there is in the record any

negligently and without warning causes the elevator to be suddenly and violently moved so that plaintiff was caught between it and the floors of the building. The second count alleged that the elevator operator recklessly and carelessly caused the elevator to be suddenly and violently moved.

Defendant first argues that the court improperly refused an instruction to the effect that the plaintiff could not recover under the second count of her declaration, as there was no evidence of wanton or willful carelessness on the part of defendant. The court properly refused this instruction. There have been many cases attempting to define wanton and willful conduct as personal injury cases. One of the cases cited in the instant case is that such conduct imports a consciousness that an injury may probably result from the act done and a reckless disregard of the consequences. Brown v. Illinois Cent. Ry. Co., 224 Ill. 326. See also opinion in Lyons v. O'Donnell, 261 Ill. 1, 4. "Wanton conduct is one of the elements of willful and wanton conduct in this connection is stated as, 'Carelessness or gross in the extreme, a indifferent a mind reckless and regardless of consequences.' (Brown v. Chicago & Eastern R. Co., 224 Ill. 326.)" Plaintiff's testimony was to the effect that as she "stepped in" the operator of that the elevator up; it then started down and "jerked my foot again;" that the operator "moved the car in a violent manner." John Quinlan testified that the elevator started moving in violently "was just starting to get into the elevator. She was hurrying in." These and other circumstances were proper to be considered by the jury in order to determine whether the defendant conduct was carelessness or in the nature of willful and wanton conduct resulting in injury to plaintiff. In a motion of this sort, the only question the court has to determine is whether there is in the record any

evidence which, if true, fairly tends to prove the allegations of the declaration. McFarlane v. C. C. Ry. Co., 288 Ill. 476. The trial court committed no error in refusing the instruction offered.

The court improperly permitted plaintiff to introduce evidence as to her income and profits from keeping roomers and boarders. Plaintiff's declaration contained no allegation concerning special damage by loss of profits. (City of Chicago v. O'Brennan, 65 Ill. 160; City of Bloomington v. Chamberlain, 104 Ill. 268.) The evidence improperly admitted was as to gross income. There was no attempt to show net profits. Profits must be proven and cannot be estimated. Pluard v. Gerrity, 162 Ill. App. 527. This is not a case of earnings, such as was involved in Barnes v. Danville St. Ry. Co., 235 Ill. 566. Plaintiff testified that her gross income from this source was $35 a week, and her attorney argued to the jury that this amount figured for 130 weeks from the time of the accident to the time of the trial would be $4550, which, he stated, defendant had taken away from plaintiff. The evidence and argument both were improper and highly prejudicial.

Another objection to this type of evidence is found in the rule that, where husband and wife are living together and he provides for the household and bears the expense of those maintained and lodged therein and the wife devotes her time and labor to household duties, the sums owed for board and lodging and services are due to the husband and not to the wife, in the absence of any agreement on his part relinquishing his right thereto. Brown, Admr. v. Walker, 81 Ill. App. 396; 46 L.R.A. (new series) 238.

Instruction No. 10 is open to the objection that it permits the jury to allow plaintiff's claim for loss of profits. It also refers to "money necessarily expended for medical and surgical treatment." There was no evidence as to any moneys so expended.

evidence which, if true, fairly tends to prove the allegations of the declaration. McGrigor v. C. & N. Ry. Co., 288 Ill. 472. The trial court committed no error in refusing the instruction offered.

The court improperly permitted plaintiff to introduce evidence as to her income and profits from nursing records and boarders. Plaintiff's declaration contained no allegation concerning special damage by loss of profits. City of Chicago v. O'Donnell, 88 Ill. 160; City of Bloomington v. Shurtleff, 54 Ill. 268.) The evidence improperly admitted was so prejudicial There was no attempt to show not profits. Profits must be proven and cannot be estimated. Alpern v. Dorfman, 168 Ill. App. 5. This is not a case of evidence, even as was involved in Dorris v. Danville C. Ry. Co., 238 Ill. 560. Counsel stipulated that her gross income from this source was $50 a week. In her closing argument to the jury that this amount figured for 10 weeks from the time of the accident to the time of the trial could be added, which, as stated, defendant had been away from plaintiff. The evidence and argument both were improper and highly prejudicial.

Another objection to this type of evidence is found in the rule that, where husband and wife are living together and he provides for the household and pays the expenses of upkeep and lodged therein and the wife dies, the fact is not liable to be made during, the same case for funeral and lodging and services due to the husband and not to the wife, or to whom he may stand on his own relationship. Kirk v. Kirk (see review) 256 Walker, 41 Ill. App. 324; 46 L.R.A. (new series) 256.

Instruction 20, at the end of the objection that it permits the jury to allow plaintiff's wife for loss of profits. It also refers to "money necessarily expended for medical and surgical treatment." There was no evidence as to any money so expended.

The court refused instruction No. 31 tendered by defendant to the effect that plaintiff was not entitled to recover for the loss of her services as a housewife. The right of action for loss of services of a wife is in the husband.

Defendant's tendered instruction No. 33 was to the effect that there was no claim that the elevator of defendant was not properly equipped or defective in any of its appliances. We see no reason why this should not have been given, although it is suggested that it also contains the statement that there was no evidence that the operator of the elevator was "incompetent." Strictly speaking, that is true. The only negligence charged was that the operator suddenly started the elevator. Whether he was competent or incompetent was not in issue.

We think the court unduly limited the cross-examination of Dr. F. C. Test, who had testified for plaintiff that he had estimated $2500 as a reasonable charge for his services. Upon cross-examination he was asked as to what he would consider a fair and reasonable charge for certain visits. Objections to these questions were sustained. Also objections were sustained as to whether he had an opinion as to what a reasonable charge for such visits would be. Defendant should have been permitted to show, if possible, that the Doctor's estimated charge of $2500 was not based upon the facts and was too large.

There was no error in the court's modification of instructions Nos. 23, 25, 26 and 27.

During the trial defendant's attorney made a motion, supported by affidavit, that a juror be withdrawn on account of the alleged misconduct of plaintiff's attorney. The affidavit was to the effect that the attorney for plaintiff had conversed with members of the jury on at least three different occasions during the trial. It is not claimed that there was anything said by the

[illegible]

[illegible] feeling in the office that no liability [illegible] for the loss of her services as a housewife. [illegible] for loss of services of a wife is in the [illegible].

Defendant's requested instruction [illegible] effect that there was no claim that the elevator [illegible] not properly equipped or defective [illegible] negligence. [illegible] no reason why this should not have been [illegible]. It is [illegible] that it also contains the [illegible] evidence that the operator of the [illegible] "[illegible]." This is [illegible], that is true. The only [illegible] operator suddenly started the [illegible]. [illegible] incompetent was not in issue.

[illegible] of Dr. [illegible] C. [illegible], [illegible] [illegible] [illegible] [illegible] examination [illegible] reasonable charge for [illegible] were excluded. [illegible] had an opinion as to what a reasonable [illegible] be. Defendant should [illegible] that the Doctor's [illegible] [illegible] items and was too large.

There was no error [illegible] instructions Nos. 23, 24, 26 and 27.

Lastly the trial [illegible] supported by affidavit, [illegible] the alleged misconduct of [illegible] to the effect that the attorney [illegible] members of the jury at least [illegible] the trial. It is not limited [illegible]

attorney about the case and there was probably no more than a casual greeting. However, even the most harmless things of this sort are not seemly. The Canon of Professional Ethics adopted by the various bar associations, section 23, says that "a lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause." Upon the next trial such an incident will not happen again.

Both attorneys indulged in highly improper remarks in their respective arguments to the jury. Counsel for plaintiff in argument demanded why the defendant did not equip the front of the elevator with doors which would have protected plaintiff. Defendant objected on the ground that there was no charge in plaintiff's declaration of inadequate equipment and there was considerable talk about the matter. The court finally overruled an objection by the defendant to this line of argument. The only words in the declaration which, it is claimed, justified the argument of plaintiff are: "that it then and there became and was the duty of the defendant, by and through its servant and agent in that regard, and maintaining and operating said elevator as aforesaid to exercise due and proper care." This is not a charge of insufficient equipment. The word "maintaining" in the connection it was used was meaningless. Plaintiff's attorney should not have been allowed to argue about the equipment of the elevator to the jury.

He also improperly referred to an alleged statement made by plaintiff and procured at defendant's instance. There was no evidence whatever of any such statement. Counsel for defendant referred to the length of time his client had been in business and the number of people it employed. Plaintiff's counsel answered that defendant was "no philanthropic institution" and made further state-

attorney about the case and there was ordinarily no more than a casual greeting. However, even the most perfunctory of this sort are not comely. The level of professional dignity adopted by the various bar associations, section 24, says in i "a lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters totally in the course." [illegible] trial such an incident will not happen again.

Both attorneys indulged in highly improper remarks in their respective arguments to the jury. Counsel for plaintiff in argument demanded why the defendant did not equip the front of the elevator with a door which would have prevented plaintiff. Defendant objected on the ground that there was no charge in plaintiff's declaration of inadequate equipment and it was inadmissible about the matter. The court thereby overruled the objection by the defendant to this line of argument. The only words in the declaration which, it is claimed, justified the argument of plaintiff are: "that it been and there been and the duty of the defendant, by and through its servant and agent in that regard, and maintaining and operating said elevator as aforesaid to exercise due and proper care." This is not a charge of insufficient equipment. The word "maintaining" in the connection in which used was meaningless. Plaintiff's attorney might not have been allowed to argue about the equipment of the elevator to the jury.

He also improperly referred to an alleged statement made by plaintiff and proved at defendant's instance. There was no evidence whatever of any such statement. Counsel for defendant referred to the length of time the client had been in business and the number of people he employed. Plaintiff's counsel answered that defendant was "no philanthropic institution" and made further state-

ments indicating that defendant received in services from its employees full value for the wages paid. Such argument was highly improper and prejudicial. Defendant's counsel also improperly seemed to threaten the jury as to the amount of the verdict it should bring in, saying: "If you go wrong, there is retribution. Don't forget that," and similar language. Such talk was highly improper. In fact both counsel seem to have forgotten the proprieties required of attorneys in addressing a jury.

We are of the opinion that the verdict of $18,000 is not justified by the extent of plaintiff's injuries and was produced by the improper conduct to which we have referred. The injuries consist of a fracture of the tibia and fibula of the left leg some six inches above the ankle, which fracture has been reduced. The medical testimony is virtually unanimous in testifying that there has been a good result. Four of the five doctors testified that there was no permanent impairment of the leg; that while there might be a slight shortening, by a slight tilting of the pelvis, the possibility of a limp is eliminated. We find no reported cases where a verdict for such a large sum in similar injuries has been sustained. We are of the opinion that the amount indicates passion and prejudice on the part of the jury so that any remittitur would not do justice.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

attorney about the case and there was certainly no more than a casual greeting. However, even the most perfunctory of this sort are not seemly. The Code of Professional Ethics adopted by the various bar associations, section 36, says that "a lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters totally in the course." [illegible] trial such an incident will not happen again.

Both attorneys indulged in highly improper remarks in their respective arguments to the jury. Counsel for plaintiff in argument remarked why the defendant did not equip the front of the elevator with a door which would have protected plaintiff. Defendant objected on the ground that there was no charge in plaintiff's declaration of inadequate equipment and it was questionable about the matter. The court thereby overruled the objection by the defendant in this line of argument. The only words in the declaration which, it is claimed, justified the argument of plaintiff were: "that it been and there because and was the duty of the defendant, by and through its servants and agents in that regard, and maintaining and operating said elevator so as to exercise due and proper care." This is not a charge of insufficient equipment. The word "maintaining" in the connection it was used was meaningless. Plaintiff's attorney should not have been allowed to argue about the equipment of the elevator to the jury.

We also improperly referred to an alleged statement made by plaintiff and proved at defendant's instance. There was no evidence whatever of any such statement. However, the defendant referred to the length of time his client had been in business and the number of people employed. Plaintiff's counsel answered that defendant was "no philanthropic institution" and made further state-

ments indicating that defendant received in services from its employees full value for the wages paid. Such argument was highly improper and prejudicial. Defendant's counsel also improperly seemed to threaten the jury as to the amount of the verdict it should bring in, saying: "If you go wrong, there is retribution. Don't forget that," and similar language. Such talk was highly improper. In fact both counsel seem to have forgotten the proprieties required of attorneys in addressing a jury.

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For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

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prejudicial. Defendant's counsel [illegible] [illegible]
threaten the jury as to the amount of the verdict [illegible]
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that," and similar language. [illegible]
fact both counsel seem to have forgotten the proprieties [illegible]
of attorneys in addressing a jury.

[illegible] is
not justified by the evidence [illegible] and was [illegible]
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injuries consist of a fracture of the fifth and sixth ribs of the left
leg some six inches above the ankle, which [illegible] has been re-
duced. The medical testimony is strongly [illegible] an [illegible]
that there has been a good result. [illegible]
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there might be a slight [illegible], [illegible]
bative, the possibility of a limp in [illegible]. [illegible]
[illegible] cause where a verdict for such a large sum in an [illegible]
[illegible] has been sustained. [illegible]
indicates passion [illegible]
any restitutur could be justified.

For the reasons indicated [illegible] in reversed and
the cause remanded.

[illegible]

O'Connor, J. J., and [illegible], J., concur.

35100

R. W. GRAHAM, A. E. DUNCAN, W. H. GRIMES, D. R. FORGAN, B. A. McDONALD, J. D. LARKIN, and J. C. FENHAGEN, Trustees of Commercial Credit Trust,

Appellants,

vs.

GEORGE C. REID,

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

263 I.A. 636

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action in replevin to recover a Marmon automobile which was taken under the writ but upon trial before the court the finding was adverse to them and judgment was entered ordering the property returned to the defendant. Plaintiffs appeal.

Plaintiffs claim title by reason of the assignment of a conditional sales contract of the automobile, in which Hal Christiansen, Inc., is alleged to have sold the automobile to S. Sanford. Defendant claims to be a bona fide purchaser from Hal Christiansen, Inc., and asserted that plaintiffs by their conduct were estopped from claiming against defendant.

Plaintiffs are in the automobile finance business. Hal Christiansen, Inc., operated two automobile retail salesrooms, one on West North avenue and the other at Irving Park boulevard and Bernard street in Chicago, and was in the business of selling new Marmon cars. The Irving Park place of business was on the corner, had large plate glass windows in the store, so that automobiles exhibited on the floor were clearly visible to passersby. Defendant had theretofore been a customer of Hal Christiansen, Inc., and had bought at least four cars previous to the present transaction.

Hal Christiansen of the Christinasen company about the middle of July, 1930, approached the son of defendant and suggested that he had a Marmon car for sale and he would like to have him inspect it the next time he was passing in the vicinity of their salesroom. The automobile was first in the salesroom of the North avenue store and defendant first saw it there. About August 1st it was transferred to the Irving Park store and was placed on the showroom floor for sale. Defendant was taken over to the showroom by his son and there saw the car and inspected it and thereafter continued to see it about two or three times a week, as he lived nearby. During all this time the car was standing on the showroom floor. It was a new car showing no signs of wear whatever and had no license plates attached. Finally on August 22nd defendant purchased the car and fully paid for it. He bought it as a new car and paid the regular price for a new car of that make and type. Defendant had no knowledge of any previous deal in which the automobile was involved.

Plaintiff's claim by virtue of an assignment on June 13, 1930, of the right and title reserved in Hal Christiansen, Inc. in a conditional sales contract to S. Sanford. This contract states that the sales price was $3016.72, of which $1152 was paid in cash, the balance to be paid at the rate of $50 a month for three months and a final payment of $1714.72. Sanford was an automobile salesman employed by the Christiansen company. The record fails to show that he ever claimed the automobile or asserted any right or title to it. A representative of plaintiff's called at the showrooms of Hal Christiansen, Inc., four and five times a month, during which time the car was exhibited for sale by the Christiansen company. At the time of the trial no one seemed to know the whereabouts of Hal Christiansen or of S. Sanford.

The rule construing Section 23 of the Uniform Sales act is thus stated in Sherer-Gillett Co. v. Long, 318 Ill. 432; a conditional vendor retains title to goods sold under a conditional sales contract as against the purchaser from the conditional vendee, unless it is by its "conduct precluded from denying the seller's authority to sell." In Gordon Motor Finance Co. v. Aetna Acceptance Co., 261 Ill. App. 536, it was held, under circumstances very similar to those before us, that Section 23 "was evidently enacted to afford protection to vendors under conditional sales contracts who could not reasonably foresee or anticipate a resale of chattels before the same were fully paid, and who through no act of theirs could be said to have made the perpetration of fraud on innocent purchasers from a conditional vendee possible." That case further held that the protection of the statute should not be extended to those who by their own acts place the indicia of ownership in a person or corporation under circumstances where it can be reasonably foreseen that fraud upon innocent persons will result therefrom.

The testimony of plaintiffs show that they were well acquainted with Hal Christiansen, Inc., and had for some years before done a considerable volume of business with it. They knew that the Christiansen company was in the business of selling cars and a representative called frequently at its place of business and must have seen the car in question displayed for sale. On the other hand, defendant was a customer of the Christiansen company; this was the fifth car he had bought from it. The sale to defendant was bona fide. He examined the car thoroughly and tested it and paid the full price for a new car. Sanford, the purchaser named in the contract, was a salesman of the Christiansen company, and this fact was known to plaintiffs. Sanford never asserted any

The rule [illegible] [illegible] of [illegible] [illegible] [illegible]

interest in the car and it is uncontroverted that it was displayed upon the floor of the Christiansen company for sale for at least five weeks before it was sold to defendant. Our conclusion is that plaintiffs knew that the car would be offered for sale and therefore, by permitting the Christiansen company to display the car on its floors they are estopped from asserting that it had no authority to sell or transfer title to the defendant.

There should also be applied the well known axiom that where one of two persons must suffer, he should bear the loss whose conduct induced it. Boice v. Finance & Guaranty Corp., 127 Va. 563; Coffman v. Citizens' Loan & Investment Co., 172 Ark. 889.

The judgment of the Municipal court was proper and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

interest in the car and it is not necessary to look it was installed upon the floor of the obstructed [illegible] company for [illegible] five years before it was [illegible]. The conclusion is that plaintiffs knew that the car would be stored for [illegible] and in [illegible] fore, by permitting the Transportation Company to display the car on its floors they [illegible] from [illegible] that it [illegible] authority to sell or transfer title to the [illegible].

There should also be [illegible] the [illegible] known which [illegible] that [illegible] one of the [illegible] that [illegible], he should be [illegible] the loss whose conduct induced it. Spice v. [illegible], 127 Va. 367; [illegible], 139 [illegible], 639.

The judgment of the [illegible] court, [illegible] is affirmed.

Affirmed.

O'Connor, J., [illegible], [illegible], concur.

35108

JOHN TOMASZKIEWICZ, a minor, by Anna Bartko, his mother and next friend,
Appellee,

v.

CITY OF CHICAGO, a municipal corporation,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

263 I.A. 536

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

November 30, 1927, plaintiff then about eight years old, was struck by a truck receiving serious injuries. He brought suit against defendant and upon the first trial had a judgment for $20,000. This was reversed by this court in an opinion filed May 26, 1930 (257 Ill. App. 646) for the reason that the evidence failed to show with any certainty how the accident happened and also because of improper instructions. Upon the second trial plaintiff had a verdict and judgment for $15,000, which defendant by this appeal seeks to have reversed. No complaint is made of the instructions given upon the second trial and the only matters presented to us relate to the ownership of the truck and the extent of the plaintiff's injuries.

The accident happened about three o'clock in the afternoon. Plaintiff had been to school and had returned to his home, which was at the southwest corner of Canton street, which runs east and west, and Leavitt street, which runs north and south. He testified that when he returned home he found no one there and as his mother had told him where she would be on Canton street if she were not at home, he started, carrying his school books, to cross Leavitt street, going east, upon the line of the south crosswalk of Canton street; that he

JOHN [illegible] KI [illegible], [illegible], Dr
Anne Smith, his wife, on behalf
[illegible]
petitioners,

v.

CITY OF [illegible], a municipal
corporation,
respondent.

M. [illegible]

[illegible] aid, was [illegible] by a [illegible] for [illegible] suits [illegible] for [illegible]. [illegible] by [illegible], 1976 [illegible] called to [illegible] also [illegible] to [illegible] by [illegible] the [illegible] pressure to [illegible] [illegible] ment of the [illegible] [illegible]

[illegible] industry [illegible] at the [illegible] [illegible] [illegible] area of [illegible] [illegible] [illegible] be [illegible] [illegible] [illegible]

looked around to see if there was any truck but saw nothing and went out into the street and when he was about four feet from the sidewalk curb he was struck by the truck which was coming south on Leavitt. Other witnesses testified that the truck was going about eighteen miles an hour on the west side of Leavitt street; that it sounded no gong nor gave any warning to the plaintiff and that after he was struck the truck continued on southward without stopping. There was evidence that it had turned into Leavitt from Fullerton street, which is about a half block north of Canton street.

The evidence presented to the jury the question of fact as to whether or not the driver of the truck was negligent in failing to see the boy and in failing to give any warning by horn or otherwise when it approached the crosswalk on which plaintiff was starting to walk. Under the circumstances we cannot say that the jury was not justified in finding defendant's driver was guilty of negligence which caused the accident.

Although certain witnesses testified that the truck in question was a lumber truck, other witnesses testified positively that the truck belonged to the City of Chicago, being a Yellow truck with a large "Y" within a circle, which is the insignia of the defendant. Without detailing the variant stories, we hold the jury could properly find that the truck was owned by defendant; at least, we cannot say that this conclusion is clearly against the weight of the evidence.

The evidence showed that the boy was struck by the front end of the truck near the right hand side; that he was thrown to the ground. When he was taken to the hospital the physician found a comminuted fracture of the skull. The physician testified that the skull was crushed in "just like an egg shell; * * pressing on the brain * * blood was spurting out through the opening." He

was operated upon and one of the fragments of the bone pressing upon the brain was removed and the others lifted. The boy was in the hospital for about nine or ten days and then remained at home in bed for five weeks. There was evidence that since then he has made a fairly good recovery, but complains of dizziness and headaches. It is difficult for a reviewing court to determine with any accuracy as to the monetary compensation for injuries. In the present case the plaintiff evidently was very seriously injured. No good reason is presented for disturbing the judgment of the jury as to the extent of these injuries.

Complaint is made of the leading character of some of the questions put to witnesses and many of them may properly be so criticized. However, we find nothing in this respect which would necessitate a reversal.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

35211

AMERICAN AUTOMATIC FIRE PROTECTION CO., a corporation, Appellee,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	
MONT CLARK BUILDING CORPORATION, a corporation, Appellant.	263 I.A. 036[4]

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a motion filed under section 89 of the Practice Act whereby defendant asked the court to vacate a judgment rendered against it, in its absence, for $1422.14. The motion was supported by affidavits on behalf of defendant and plaintiff also filed an affidavit. After hearing the court denied defendant's motion and it appeals. The judgment was entered in the January, 1931, term of the Superior court and the instant motion to vacate was filed in the February, 1931, term.

Plaintiff's counter-affidavit was not filed pursuant to any rule or order and defendant says that in the absence of any such order there was no issue either of law or fact joined and, therefore, plaintiff must be held to have waived all objections to the sufficiency of the motion. If this were true, the mover by failing to ask that the opposite party be required to plead could establish the sufficiency of his motion. This manifestly cannot be. Furthermore, defendant did not ask for any default against plaintiff for failure to plead or demur. It will, therefore, be held to have waived any irregularities in procedure.

The gist of defendant's petition is that the judgment sought to be vacated was caused by alleged misprisions of the

[illegible]

[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

v.

[illegible]
a corporation,
[illegible]

[illegible]

This is a motion [illegible] a motion in a [illegible] Act [illegible] [illegible] be vacated [illegible] against it, in the amount, [illegible]. The motion was opposed by affidavits on behalf of [illegible] and [illegible] affidavit. [illegible] the court [illegible] motion and it appeals. The judgment [illegible] in [illegible], [illegible] of the superior court [illegible] in the country [illegible].

[illegible] only rule or [illegible] such order [illegible] therefore, plaintiff must be held [illegible] objections to the sufficiency of the motion. If [illegible], we cover by failing to ask that the opposite party [illegible] could establish the sufficiency of his motion. This [illegible] be. Furthermore, [illegible] plaintiff [illegible]. It will, therefore, be held [illegible] [illegible].

[illegible] sought to be vacated [illegible] judgment of the

clerk of the Superior court which misled defendant's attorneys and caused their failure to appear when the cause was reached for trial.

It appears from defendant's affidavits filed in support of its motion that the original suit had been pending more than two years prior to the entry of the judgment; that defendant had on file its plea and affidavit of merits; that the rules of court required the clerk to stamp on the file wrapper the name of the judge to whom the case was assigned and that no such name had ever been so stamped; that at some time the numeral "8" was placed on the wrapper and that this number remained thereon and was not changed; that from this defendant's attorneys and the law clerk who watched the court calls "assumed" that the cause would appear upon the Common Law Calendar No. 8 of said court when the September, 1929, calendar was printed. The affidavits further show that on September 10, 1930, plaintiff's attorney duly served defendant's attorneys with a notice that said cause would be placed upon the trial calendar pursuant to rules of the court, but that said notice did not designate any calendar upon which said cause would appear and that attorneys for the defendant continued as before to watch and to cause said call to be watched upon the trial calls of calendar No. 8 so far as the same were published from day to day by the Chicago Daily Law Bulletin, and that said cause never appeared upon any of the calendar calls of said calendar 8.

It thus appears that defendant through its attorneys for two years or more knew that the clerk had not stamped the file wrapper with the name of any judge and also knew that the notice served by plaintiff in September, 1930, that the cause would be placed upon a trial calendar did not designate the particular calendar on which said cause would appear; the law clerk from the

clerk of the superior court [illegible] [illegible] attorneys and counsel shall failure to report [illegible] the order [illegible] for trial.

[illegible] [illegible] [illegible] in support of the motion that the criminal [illegible] been working more than two years prior to the [illegible] that [illegible] at the time its plea was officially [illegible] [illegible] required the clerk to stand on the file [illegible] the judge to [illegible] the [illegible] was assigned was [illegible] that [illegible] on the [illegible] that [illegible] this number [illegible] defendant's [illegible] "assumed" that the [illegible] No. 8 of this court [illegible] September, 1929, [illegible] the [illegible]. The affidavits further show that on [illegible] 1929, plaintiff's attorney duly served [illegible] with a notice that said court would be placed upon [illegible] pursuant to rules of the court, [illegible] upon which said [illegible] would [illegible] for the defendant continued [illegible] upon the [illegible] to be [illegible] published [illegible] upon the [illegible] said calendar 8.

[illegible] for the [illegible] the [illegible] the [illegible] wrapper with the [illegible] served by plaintiff in September, 1929, that the [illegible] placed upon a [illegible] calendar nor [illegible] the particular calendar on which said [illegible] the [illegible] the clerk from the

office of defendant's attorneys, when this notice was received by defendant, examined the clerk's docket and "that the docket of said court then contained a rubber stamp indorsement of the name of Judge Eller, who had theretofore called Common Law Calendar No. 4 of said court," and that thereafter he watched only the calls of Common Law Calendars Nos. 4 and 8. It does not appear that the case ever did appear on these calendars. This court will take judicial notice of the fact that Judge Eller was not one of the judges of the Superior court at this time.

It also appears that subsequently the clerk of the Superior court prepared a supplemental calendar No. 1 and that this case appeared upon this calendar as assigned to Judge Harry B. Miller. It is obvious that an examination of this calendar would have disclosed this and in failing to make same defendant's attorneys did not use due diligence.

Considering the plaintiff's counter-affidavit, it appears that defendant's attorneys had actual notice that the cause had been assigned to Judge Miller. In October, 1930, plaintiff's attorney told one of defendant's attorneys that the cause would shortly be reached for trial before Judge Miller and that it was No. 257 on his calendar.

In Cramer v. Commercial Men's Assn., 260 Ill. 516, where, as here, error was assigned upon the failure of the clerk to place the name of a judge upon the file wrapper as required by the rules, the court said:

> "The fact that the clerk had not complied with the rule was known or should have been known by the exercise of reasonable care and attention on the part of the attorney for the defendant, and the motion is not intended to relieve a party from the consequences of his own negligence."

We agree with plaintiff's counsel that Holbrook v. Lawton,

office of defendant's attorneys, upon the motion [illegible] received by defendant, examined the clerk's docket and "saw the docket of said court then contained a rubber stamp indorsement of the name of Judge Miller, who had interpleaded [illegible] Judgment No. 4 of said court," and that there [illegible] only the name of Common Law Plaintiffs Ben. 4 and 5. [illegible] it does not appear that the case ever did [illegible] on the docket. This court will take judicial notice of the fact [illegible] one of the Judges of the "superior c[illegible] this.

It also appears [illegible] the clerk of the superior court prepared a supplement [illegible] Judgment No. 2 and that this case was [illegible] to Judge Miller. It is obvious that an or[illegible] or this judgment could have misdoubted this and in fact [illegible] defendant's attorneys did not see due diligence.

Considering the plain [illegible] it appears that defendant's attorneys have [illegible] that the cause has been assigned to Judge Miller. In October, 1[illegible], plaintiff's attorney told one of defendant's attorneys that [illegible] be reached for trial before Judge Miller [illegible] on the calendar.

In Kramer v. Industrial Accid. Comm., [illegible] Ill. 31[illegible], where, as here, [illegible] the name of a judge upon the docket [illegible] the court said:

> "The fact that the [illegible] complied with the rule are known or should have been known by the exercise of reasonable care and attention on the part of the attorney for the defendants, and the motion is not intended to relieve a party from the consequences of his own negligence."

[illegible] agree with plaintiff's counsel that Holbrook v. Lipton,

207 Ill. App. 497, cited by defendant, is not in point. There, the default and judgment were entered by a judge who had no right to enter orders in the case, as it had been assigned to and appeared upon the printed calendar of another judge.

There is no merit in the point that the alleged failure of the clerk to comply with the provisions of section 19 of the Practice Act with reference to furnishing the bar with a copy of the docket of the cases pending in the Superior court caused the ex parte judgment to be entered. The statute evidently does not contemplate that a copy of the docket shall be personally delivered to every member of the bar but only that the same shall be furnished when requested. There is no allegation in defendant's petition or affidavits that any such request was made or refused; in fact, there is a clear inference from the allegations as to Supplemental Calendar No. 1 that such a calendar was delivered to defendant's attorneys.

The affidavits do not support the claim that the defendant was fraudulently prevented from appearing and making its defense. Counsel for defendant in his affidavit asserts that counsel for plaintiff, when the cause was reached for trial, advised the court that as a matter of fact the attorneys for defendant were not going to defend the suit and that defendant had no defense and it was alleged that this was a misrepresentation and untrue. It cannot be said that the court relied upon this statement in entering judgment for plaintiff. It was, at most, an expression of opinion. By the counter-affidavit of plaintiff it is asserted that one of defendant's attorneys had stated to plaintiff and his attorney that in view of the many judgments against defendant he did not know whether or not the case would be contested. This may have been sufficient ground for the statement claimed to have been made by plaintiff's counsel to the court that

defendant had no defense.

It is said that the ex parte judgment of January, 1931, was excessive in that it exceeded by some $12 the amount claimed in the **ad damnum**. Neither the declaration nor the judgment appears in the present record and the amounts are given only in defendant's affidavits. Such an error, if any, cannot be cured by a motion under section 39, as the amount of the judgment is not a fact of which the trial court was ignorant.

Upon defendant's petition and affidavits the trial court could properly conclude that the failure of defendant to be present at the time the cause was called for trial was due to its own negligence and therefore the petition to vacate the judgment was properly denied.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, concur.

35260

MICHAEL FAHEY,
Appellee,

v.

CHICAGO NATIONAL LIFE INSURANCE COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

263 I.A. 637

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit upon a policy of life insurance issued to his wife, Anna M. Fahey, upon trial by the court had judgment for $1000, from which defendant appeals. A number of points are presented, but we shall reverse the judgment because of erroneous rulings upon the admissibility of certain important and competent pieces of evidence.

The policy, among other things, contained a clause that, if the first premium was not paid at the time the application for the policy was made, the insurance should not become effective until it was paid "and the policy delivered to and accepted by me (the insured) during my lifetime and in good health." No premium was paid, and it is argued that it therefore became incumbent upon plaintiff to prove that the insured was in good health at the time of the delivery of the policy and that this provision was a condition precedent to recovery, citing Daniels Motor Sales Co. v. New York Life Insurance Co., 220 Ill. App. 83, where a similar provision was so construed. In that case, however, it appears that the policy was delivered January 26, 1913, after the insured had been suffering for at least three days from pneumonia in a hospital and died the day following the delivery. It was thus shown that the insured was not in good health at the time. Although there are other decisions

in which it is said that it is incumbent upon the plaintiff to prove that the insured was in good health at the time of the delivery of the policy, yet the facts involved show that the insured in those cases was not in good health when the policy was delivered. The instant policy was delivered September 11, 1928, and the insured died April 11, 1929. Her husband testified that she was in sound health at the time of the delivery, but there was some testimony by physicians to the contrary, although some of this was improperly stricken. Under these circumstances the provision in question is not a condition precedent to recovery but may be invoked in defense. Middleton v. North American Protective Assn., 260 Ill. App. 288, and cases there cited.

The application for the policy, which must be construed as part of the contract, contained the question: "Have you ever been rejected, postponed or limited for insurance applied for, by any other Company, Association or Society? Give particulars." This the insured answered: "No." Such a question is material and an answer which conceals the fact of insured having made a prior application and having been rejected defeats a recovery. Rostenkowski v. Chicago National Life Insurance Co., 259 Ill. App. 673, and cases there cited; 37 C. J. 467, page 131. Defendant sought to prove that the insured had made application to two other life insurance companies for insurance on her life within thirteen months before she applied to defendant and the applications had been rejected. A photostatic copy of an application of Anna M. Fahey addressed to the Indianapolis Life Insurance Company for insurance, dated August 2, 1927, together with a medical report signed by herself and a physician was offered in evidence. The instrument was certified to by the secretary of the Indianapolis Life Insurance Company, the custodian of the records and seal of the corporation. The court

these

sustained an objection to this. Section 15, chapter 51, Illinois Statutes, provides that:

> "The papers, entries and records of any corporation or incorporated association may be proved by a copy thereof, certified under the hand of the secretary, clerk, cashier or other keeper of the same. If the corporation or incorporated association has a seal, the same shall be affixed to such certificate."

Such evidence was admissible as original and not secondary. C. B. & Q. R. R. Co. v. Weber, 219 Ill. 372; Mandel v. Swan Land Co., 154 Ill. 177; Estate of Healea v. Healea, 254 Ill. App. 334.

Objection was made to another similar document - defendant's exhibit 4 for identification - which purported to be an application of Anna M. Fahey to the Lincoln National Life Insurance Company for insurance. This was a photostatic copy certified to by the secretary of the corporation. It was error to refuse to admit this in evidence. It was also error to reject defendant's exhibit 5 for identification which was a photostatic copy of the medical examination of Anna M. Fahey made and prepared by Dr. Jack. This physician testified that when he had examined the applicant for insurance in the Lincoln National Life Insurance Company he found a heart murmur and when asked whether or not this condition was chronic replied that it was and "once present always present." On motion this answer was erroneously stricken.

The witness, Charles O. Reynolds, was not permitted to answer many competent questions with reference to the Lincoln National Life Insurance Company, its location and its officers. The witness, John F. Reynolds, agent for the Indianapolis Life Insurance Company, was asked whether or not the application of Anna M. Fahey had been accepted by his company. An objection to this was sustained. He was also asked as to what was done with the premium paid by her. Objection to this was sustained. Later on he was permitted to answer that he had returned the

premium to her and he was then asked if he said anything to her when he returned the premium. An objection to this was sustained, the court ruling that the defendant "cannot show what the transactions were with her." This was obviously an erroneous ruling. The evidence was material to her statements in her application to defendant that she had never been rejected, postponed or limited for insurance by any other company.

Upon the second trial the court should not strain a point to keep out of the record evidence of the facts touching her applications, if any, for prior insurance and the actions of the respective companies upon such applications. The facts sought to be disclosed were vital to the defense and the defendant should be permitted to present its evidence upon this point. Other points are suggested, but we prefer to base our conclusion upon the erroneous rulings of the trial court as indicated.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

34930

CARL KIEFER,
Appellee,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

263 I.A. 637

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in the sum of $12,000 entered upon the verdict of the jury, after motions for a new trial and in arrest of judgment had been overruled. The action was brought under the Federal Employers' Liability act.

The declaration, which was in two counts, charged in substance that on June 29, 1929, defendant owned and operated a certain steam railroad system with tracks, engines, cars and yards in Joliet, Illinois, where plaintiff was employed as a switchman for cars; that on that day while an engine attached to certain cars used in interstate commerce was moving very slowly, and while plaintiff in the exercise of his duty was in the act of stepping upon and boarding the tender of the engine, the engineer carelessly and negligently caused the speed of the engine to be increased suddenly, violently and with a jerk, by means whereof plaintiff was thrown and injured. It further charged that under the circumstances and by reason of the same negligence, plaintiff slipped and fell from the step of the tender of the engine and came into a position of great peril, being thrown and dragged upon the ground, of which the engineer had or in the exercise of due care would have had notice, but that the engineer failed to stop the engine and tender, thereby injuring plaintiff to his damage.

It is argued that under the uncontradicted evidence,

34930

CARL [illegible],	)
Appellee,	
	)
vs.	)
	)
[illegible], Joint and Several	)
RAILWAY LEASING, a Corporation,	)
Appellant.	)

MR. JUSTICE [illegible]

[illegible] Judgment, in the sum of $1,[illegible] entered on a verdict of the jury, after denying a motion for a new trial and a motion of defendant [illegible] verdict. The action was brought under the federal employers' liability act.

The [illegible] substance that on June [illegible], defendant owned and operated a certain [illegible] known as [illegible] Junction, [illegible] in Joliet, Illinois, [illegible] for cars; that [illegible] used in interstate commerce was moving [illegible] tiff in the exercise of his duties in the [illegible] and handling the "[illegible]" on the engine, he [illegible] negligently caused the engine to [illegible] violently, [illegible] injured. [illegible] reason of the same [illegible] step of the [illegible] peril, being thrown [illegible] mer had or in the exercise of due care [illegible] that the engineer failed to [illegible] injuring plaintiff in his leg.

It is argued that under [illegible] evidence,

plaintiff was not engaged in interstate commerce at the time he received his injury; that as a matter of law plaintiff assumed the risk of his injury; that defendant was not guilty of negligence, but that plaintiff's injury was the result of his own negligence and not of any fault on the part of defendant.

The points made require a careful examination of the facts. Defendant in its brief expressly waives any right to reversal for the purpose of awarding a new trial, but asks for a reversal with a finding of facts, and says that if this court is of a contrary opinion then defendant requests that the judgment be affirmed.

The first question is, of course, whether plaintiff was actually engaged in the work of interstate commerce at the time he was injured. If he was not so engaged, then the act upon which plaintiff bases his suit would not be applicable. (Mondou v. N. Y. N. H. & H. R. Co., 223 U. S. 1.) The parties seem to be agreed that the rule by which the question is to be determined is laid down in Shanks v. D. L. & W. R. Co., 239 U. S. 536, where the court said:

> "The true test of employment in such commerce in the sense intended is, Was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"

The act, when it does apply, is exclusive of other remedies. Chicago R. I. & Pac. Ry. Co. v. Schendel, 270 U. S. 611.

This court is also committed to the proposition that whether a plaintiff's intestate was engaged in interstate commerce at the time of receiving injuries resulting in his death, is ordinarily a question for the jury. It was so held in Foreman T. & S. Bank v. G. T. W. Ry. Co., 242 Ill. App. 428, upon the authority of Brown v. Ill. Terminal Co., 319 Ill. 326; Pennsylvania Co. v. Donat, 239 U. S. 50; North Carolina R. Co. v. Zachary, 232 U. S. 248. The same rule has been recently stated in Bolle v. C. & A. W. Ry. Co., 324 Ill. 479.

plaintiff was not engaged in a private business [illegible] received his injury; that [illegible] of [illegible] risk of his injury; that [illegible] was [illegible] negligence, but that plaintiff's injury was the result of his own negligence or of any fault on the part of [illegible].

The points made require a [illegible] of the facts. Defendant in its brief [illegible] relied on [illegible] and for the purpose of [illegible] a new trial, [illegible] a reversal with a finding of facts, and [illegible] in [illegible] contrary opinion than defendant [illegible] that the judgment be affirmed.

The first question is, of course, whether plaintiff was actually engaged in the work of interstate commerce at the time he was injured. If he was not so engaged, then [illegible] plaintiff based his suit could not be maintained. ([illegible] K. R. & R. I. Co., 224 [illegible]). The question [illegible] that the rule by which the question is to be determined is [illegible] Shubay v. [illegible] R. & [illegible] R. R., 239 [illegible] 326, where the court said:

> "The true test of employment in such commerce is the nature of the work in which the employee is engaged at the time of the injury, and whether the work in which he was actually engaged in interstate transportation, or in work so closely related to it as to be practically a part of it."

The act, when it does apply, is exclusive of other [illegible]. [illegible] R. I. & Pac. [illegible] v. [illegible], 279 [illegible] 61.

This court is also committed to the proposition that whether a plaintiff's interstate [illegible] in interstate commerce at the time of receiving injuries complained of, is a question, in ordinary a question for the jury. [illegible] Bowman [illegible] Back v. [illegible] R. R., 249 Ill. App. 474; [illegible] Brown v. Ill. Central R., 310 Ill. 326; [illegible] 239 U. S. 54; [illegible] v. [illegible], 243 [illegible] these rule has been recently stated in [illegible] 324 Ill. 479.

Defendant contends, however, that the Supreme court of Illinois has overruled Bolle v. C. & N. W. Ry. Co. in Spencer v. C. & N. W. Ry. Co., 336 Ill., 560, reversing the same case in 249 Ill. App. 463. It also argues that North Carolina R. Co. v. Zachary, 232 U. S. 248, and Pennsylvania Co. v. Donat, 239 U. S. 50, have been overruled by the recent case of T. St. L. & W. R. R. Co. v. Allen, 276 U. S. 165, following Erie R. R. Co. v. Welsh, 242 U.S. 303. The Spencer case is not inconsistent with the former decisions of our Supreme court. The court there stated in substance that the facts as to what plaintiff's duties were and what he was doing were not in controversy and that the question was "whether under these undisputed facts he was engaged in interstate commerce." The court held as a matter of law that plaintiff was not so engaged. The cases holding that if there is a controversy as to the facts the question is one for the jury, are not referred to, and we can hardly suppose that it was the intention of the court to overrule a long line of cases without referring to any one of them. There is of course no question that in actions brought under the federal statute the principles of the common law as interpreted and applied in the federal courts are applicable. (Brundege v. C. B. & Q. R. R. Co., 324 Ill. 76.) We do not regard T. St. L. & W. R. R. Co. v. Allen, as in any wise contrary to the holding of the U. S. Supreme court as theretofore announced. It appeared in that case that the plaintiff while checking cars in the switchyards was struck by a car shunted down the adjoining track. The plaintiff was standing in the space between the two tracks, and the space was sufficient to enable him to keep out of the way of the moving cars, although the danger in his work would have been lessened if the space had been greater. The negligence alleged was that the defendant had failed to maintain an adequate space between the tracks and to warn the plaintiff of the approach of the car. The opinion of the court examined the

Petitioner contends, however, that the Seventh Circuit of Illinois has overruled [illegible] v. [illegible], [illegible] v. [illegible], [illegible] F. [illegible] 2d [illegible], 380 Ill. [illegible], rejecting the same case in 298 Ill. App. 488. [illegible] [illegible] v. [illegible], [illegible] F. [illegible] 2d [illegible], [illegible] have been overruled by the recent case [illegible] v. [illegible], [illegible] Ill. [illegible] 2d [illegible] v. Allen, 278 [illegible] 1d, following [illegible] v. [illegible], 40 [illegible] 303. The [illegible] case is not inconsistent with [illegible] of our Supreme Court. The point in [illegible] contends that the facts as to what [illegible] were not in controversy and the question was "whether under these undisputed facts he was [illegible] in interstate commerce." The court held as a matter of law that [illegible] was not [illegible]. The cases holding that it [illegible] is a controversial [illegible] the question is one for the jury, are not relevant [illegible], and we [illegible] suppose that it was the intention of [illegible] to overrule a long line of cases without mentioning [illegible] of them. There is a commonly recognized rule that in matters brought under the federal statute the principles of the common law as interpreted and applied in the federal courts are [illegible]. [illegible] 324 Ill. 76. We do not regard [illegible] as in any wise contrary to the [illegible] of this [illegible] as interpretive authorities. It appeared in that case [illegible] tiff while [illegible] was in the employ of the [illegible] shunted down the adjoining track. The [illegible] space between the two tracks, and the [illegible] to keep out of the way of the moving cars, [illegible] in his work would have been [illegible] the [illegible] The negligence alleged was that the [illegible] an adequate space between the tracks and to [illegible] the approach of the car. The opinion of the court [illegible]

evidence and held that as a matter of law plaintiff assumed the risk and that as a matter of fact there was no foundation for a finding in favor of plaintiff and that "engineering questions" would not be left "to the uncertain and varying opinions of juries," citing Tuttle v. Milwaukee Ry., 122 U. S. 189; Randall v. B. & O. R. R. Co., 109 U. S. 478, and Washington, etc., R. R. Co. v. McDade, 135 U. S. 554. Here, also, it appears that the opinion of the court does not indicate any intention to overrule or depart from any of the prior decisions of the court. It is true upon this, as well as other issues in this case, that there is little, if any, conflict in the evidence.

Plaintiff was a switchman, 59 years of age, working at the Joliet yards of the defendant company. The crew with which plaintiff worked consisted of a foreman, a helper, an engineer and a fireman. Plaintiff was injured at the Joliet yards about 8:30 p.m. on June 29, 1929. The yards consisted of a system of tracks and leads where the yard tracks diverge. All the yard tracks were connected with the lead. Plaintiff had worked for defendant about two years and eight months, and at the time he was injured he was assisting in a switching operation, his duty being, as one of the crew, to follow the engine and do the pin pulling. At this particular time the foreman went back with the engine to get three cars, and the plaintiff stayed out on the lead to watch. Two of the three cars to be moved had cards on them indicating that they were to go to Rockdale, Illinois, and the third car, which was next to the engine, was known as a gondola car. It belonged to the Chesapeake & Ohio Railway Co., and was carded to go to Griffith, Indiana. This car was the one which plaintiff was attempting to board at the time he received his injury. At the time he was injured plaintiff was working in Yard C, which was used for distributing cars in making

[illegible]

up trains bound out of Joliet, Illinois, to Indiana. It was the custom to place on Track 3 of Yard C cars of the Chesapeake & Ohio Railroad Co., the Grand Trunk Railroad Co., the Erie and Michigan Railroad Co., the Pennsylvania Railroad Co., the Hartsdale Railroad Co., and the Michigan Central Railroad Co., bound for Griffith, Dyer and Hartsdale, Indiana. The usual way of doing the work was that the cars would be taken first to Yard D where they were afterwards made into trains going to the above named places. When the crew got a string of cars together they would first put the cars in Yard C on Track 3, and when a number of them had been assembled at that place, the crew would take them to Yard D to be put into a train. This train running from Yard D was an extra train and ran every night. The number of the engine used was Ex. 711, and that engine in the usual course of business would haul out of Yard D on every night a train for an interstate trip. The train usually consisted of about 75 cars. On the night on which plaintiff received his injury the crew with which he was working had put on Track 3 in Yard C five or six cars which were bound for Dyer, Griffith and Hartsdale; and after the crew had accumulated some cars for that run on Track 3 in Yard C, the foreman went back with the engine to get three cars, two of which, as already stated, were carded to Rockdale, Illinois, and the other, the empty gondola car next to the engine, was carded to Griffith, Indiana.

The testimony of the plaintiff is to the effect that he knew where the empty gondola car was going by the carding on it; that that was his business; that the foreman did not always give orders where to switch cars, but that the switchman was supposed to know by the cards on the cars. The cards were about 4 inches long and 2½ inches wide and were always put upon the side of the cars on which the switchman worked in the yard, and they remained on the

no trains bound out of Joliet, Illinois, [illegible] custom in place of track [illegible] Railroad Co., the Grand Trunk [illegible] Railroad Co., the Pennsylvania [illegible] Co., and the Michigan Central [illegible] Dyer and Hartsdale, Indiana. The [illegible] that the cars would be [illegible] afterwards were [illegible] the crew got a string of [illegible] cars in Yard C on [illegible] a number [illegible] had been assembled at that place, [illegible] put into a train. [illegible] train and ran over [illegible] 711, and that engine [illegible] out of Yard C on every [illegible] train usually consisted of about 75 [illegible] plaintiff received his injury [illegible] but out on Track 2 [illegible] Dyer, Griffith and Hartsdale; [illegible] some cars for that run [illegible] with the engine [illegible] were carried to [illegible] car next [illegible]

[illegible] he knew where [illegible] that that was the [illegible] orders where [illegible] know by the cards on [illegible]. The [illegible] and 2½ inches [illegible] which the switchmen worked [illegible]

cars until the cars arrived at their destination in order that the switchmen might know where to switch the car. Plaintiff's testimony is further to the effect that the cards were never torn off the cars; that it was the intention that the gondola car should be switched into Yard C on Track 3 by the switching crew and that was the track on which the cars had been accumulated; that the switching crew later in the evening were to go back to that track according to their usual custom and get the empty gondola car with the engine, pull it out and haul it to Yard D; that if Track 3 of Yard C was well filled up, the crew would sometimes make two trips.

It appears from the report made by the conductor of train No. Ex. 711 that on June 29, 1929, this train left Joliet, Illinois, at 11:15 p. m., carrying three empty gondola cars of the Chesapeake and Ohio Railroad Co., and that the final destination of the cars was Griffith, Indiana. It further appears from the "Daily interchange report of cars" from the defendant company to the Chesapeake and Ohio Company at Griffith, Indiana, that Taggart, the agent at Griffith, on June 30, 1929, had receipted for these three empty gondola cars.

We have been cited to a large number of cases supposed by the parties to be analogous to this one, some of which it is claimed tend to show that the proof was sufficient to establish the fact that plaintiff was engaged in work which might properly be described as interstate commerce, and others which it is claimed show the contrary. A review of these cases would require unnecessary labor and be quite without value as far as the decision of the present case is concerned. The evidence given by plaintiff is direct, and it is corroborated by the circumstantial evidence tending to show that the particular car in connection with which he received his injury did in fact make the interstate movement which his direct evidence tended to show it was about to make.

cars until the cars arrived. [illegible] in order that the watchman might know [illegible] switch the car. [illegible] it [illegible] many in [illegible] to the effect that [illegible] the cars; that it was the intention [illegible] car would be switched into [illegible] the switching crew [illegible] the track on which the cars had been [illegible] switching crew later in the evening [illegible] to their usual [illegible] the engine, pull it out and [illegible] C was well filled up, the crew [illegible] there.

It appears from the report [illegible] train No. [illegible] on June [illegible], [illegible] Illinois, at [illegible] Chesapeake and Ohio [illegible] of the cars was [illegible] "Daily Interchange Report of Cars" [illegible] the Chesapeake and Ohio [illegible] the report of [illegible] three empty [illegible] cars.

[illegible] by the parties to be [illegible] claims [illegible] the last [illegible] to be described as [illegible] show the country. [illegible] many labor and [illegible] present case is [illegible] first, and it [illegible] line to show that the [illegible] received its injury [illegible] the direct cause [illegible] the direct evidence [illegible] [illegible].

The gist of defendant's argument appears to be that the record does not show a predetermined interstate movement; nor does it show that the particular car in question left Joliet for Griffith on the night of July 29, 1929, or for any other point, nor that it arrived there the next day or at any other time in the future, nor where the cars came from that made up No. Ex. 711 the night of the accident or on any other occasion; that there is an absence of proof of orders to take the particular car from Yard C to Yard D later in the evening; that the record does not show that plaintiff was in fact working under orders of the foreman; that there were no orders from the yard-master regarding any switching movements to be made in Yard D, from Yard C to Yard D, or from Yard D into extra 711. Defendant points out that the evidence shows without conflict that the particular car came from the repair track on that evening, and it is complained that there is no evidence in the record of what repairs were made, how long the car was on the repair track, that an interstate journey was temporarily interrupted, who placed the cards on the side of the car, when it was so placed, whether the person who placed it thereon had authority to direct its movements outside the state of Illinois. Defendants contends such authority to direct such a movement might come only from the yardmaster. In short, defendant contends that the real test of an interstate movement is whether the car had commenced a predetermined interstate movement, and that if this question cannot be answered in the affirmative from the evidence, the jury in its verdict can not supply the deficiency. It is said that the inference that this car was actually moved from Joliet, Illinois, to Griffith, Indiana, is based, first, upon the presumption that the usual custom of transferring the cars from Yard C to Yard D was followed, and, secondly, upon the presumption that the cars in Yard D were

The plea of [illegible] defendant [illegible] that the record does not show a misdescribing and [illegible] at, and does it show that the particular car in question left [illegible] for [illegible] on the night of July [illegible], or for [illegible] water, nor that it arrived there [illegible] in the future, nor where the car came from [illegible] we are, for the night of the accident or on any other [illegible] absence of proof of orders to the contrary [illegible] to Yard 3 later in the evening; [illegible] the record does not show that plaintiff was in fact working under orders [illegible] that there were no orders for the yardmaster [illegible] movements to be made in Yard 3 [illegible] 3 into water [illegible]

without conflict [illegible] on that ground, nor [illegible] the record of what [illegible] repair track, [illegible] who placed the car [illegible] whether the person who [illegible] the movements [illegible] such authority to [illegible] yardmaster. [illegible] interstate movement [illegible] insurance [illegible] in the affirmative [illegible] not supply the deficiency. [illegible] this car was [illegible] Indiana, [illegible] carrier of [illegible] and, accordingly, [illegible] in Yard 3 were

actually taken to Girffith, Indiana, on the evening in question, thus basing a presumption upon a presumption, which is not permissible on the authority of Globe Accident Ins. Co. v. Gerisch, 163 Ill. 625.

The fact, however, that this train left Joliet on the night of the accident and that it made the trip to Griffith, Indiana, is not based upon a presumption. It is based upon the official reports of the employees of the defendant company whose duty it was to make such reports. It is probably true, considering the evidence all in all, that such case is not proved as might easily have been proved by defendant who was in possession of practically all the direct evidence bearing upon the movements of the different cars and trains. As defendant admits, the evidence is uncontradicted, and the only evidence offered on this point seems to have been submitted in behalf of plaintiff. The record does not disclose any attempt on the part of defendant to clarify the facts bearing on this point. It is apparent that there is much evidence which would have made this matter entirely clear, but it was all in the possession and control of defendant and was not produced. Defendant may not escape the inference which arises from the failure to produce this evidence. This court held in Mattocks v. C. & A. Ry. Co., 187 Ill. App. 529, that the tags and lettering on cars might be sufficient when considered with other evidence to make a prima facie case for a plaintiff that the train upon which he worked was engaged in interstate commerce, and the rule does not seem unreasonable, especially where, as here, there was testimony tending to show that it was the usual and customary manner in which the immediate use to which the car was to be put was indicated to the employee. We hold the evidence in this case was prima facie sufficient to show that the car in connection with which plaintiff received his injury

was at that time in use in interstate commerce. At least the evidence was such as to justify the submission of the question to the jury.

The next contention of defendant is that plaintiff assumed the risk of his injury. As on the first point so on this defendant argues as a matter of law that the risk was assumed by plaintiff. The facts which the jury might reasonably have found from the evidence are that after certain other switching work on the evening in question, the foreman of the crew said the crew should go to the airline and get these three cars. Plaintiff did not go with them but stayed on the lead to watch and await their return. The crew came back with the three cars. The two rear cars, which were carded for Rockdale, Illinois, were switched to Track 5, Yard A. The car which was carded for Griffith, Indiana, was intended to be "kicked" into Yard C and on Track 3. The other cars, which were intended to make the interstate run, were on that track.

At the time of the accident to plaintiff, the crew was on a track which was called the old main line. There was a puzzle switch about 150 feet south of the Jackson street viaduct, and it was at that point that plaintiff received his injury. Plaintiff gave the engineer a signal to go over the puzzle switch and line it up for the lead in C yard, manipulating the tracks with two levers. The engine was south of him and was headed toward the south. There was a tender on the rear end of the engine and north of that was the gondola car. The engine was backing north. The gondola car was 35 feet south of plaintiff. Plaintiff testifies that he walked up to the rear end of that car; that he had not yet given the signal to the engineer. When he came to the back end of the car, he had his lamp with the bell on top, and he gave the

was at that time in use in the yards. However, the best the evidence [illegible] to justify the [illegible] of the question to the jury.

[illegible] assumed the risk of his injury. [illegible] defendant argues as a matter of law that the risk was assumed by plaintiff. The lower court [illegible] the jury [illegible] from the evidence are that after certain other [illegible] the evening in question, the [illegible] slowly so to the alarm and yet there [illegible] not go with them but stayed [illegible] return. The crew came back [illegible] cars, which were [illegible] Track 5, Yard 8. The car [illegible] was intended to be "kicked" into Yard 8 [illegible] cars, which were [illegible] track.

At the time of the incident in question, the crew was on a track which was called the old main line. There was a [illegible] switch about 100 [illegible] of the [illegible] was at that point that the plaintiff received his injury. Plaintiff gave the engineer a signal to go over the parallel switch and line it up for the lead in 8 yard, [illegible] the tracks with two levers. The engine was coming [illegible] towards the south. There was a tender [illegible] the engine but behind of that was the caboose car. The [illegible] coming north. The caboose car was 35 feet south of plaintiff. Plaintiff testifies that he walked to the rear end of that car [illegible] given the signal to the engineer. [illegible] the car, he had his lamp [illegible] the car, [illegible] on top. [illegible]

signal to back up, throwing the lamp across his head. He was on the right hand side, the engineer's side, looking the way the engine was going. The engineer responded to the signal and started to back up. Plaintiff kept walking south toward the engine and walked to the point of the car that was attached to the engine. His duty was to get on the footboard of the engine as it came to him, and then he would ride to a point where the engine foreman would give him a sign to get off and give the car a start which would roll it into the track by its own momentum. When the south end of the car got to him it was moving about four miles an hour. He says:

> "I went to get the footboard, I got the rung of the coal car with the left hand. As I did that he suddenly increased the speed. The engineer increased his speed. That made my foot miss the footboard and lit back of it. By missing the footboard I caught on with my arm, threw me off my feet entirely and I had to drag. I got the run of the coal car and the engineer suddenly increased his speed as I got my foot over to get the footboard and went back of it and the jerk threw me off both my feet and dragged me. It threw me off my balance so I lost my foothold.***
>
> Then I was dragged. At the time I tried to get on there and fell I was 40 feet from the center of the puzzle switch. I was dragged to the middle of the switch as near as I can say. I had held with my left hand on the rung of the gondola. While I was dragged my right foot got all bruised up. When we got to the puzzle switch my toes caught on something and jerked my hand loose."

He further testified that the wheel of the tender ran over his leg; that when the engine stopped he was lying right below the back window of the cab; that the tender was then north of him; that it was about 25 feet long; that he was lying about 8 or 9 feet from where the engine and tender were coupled together; that there was north of him 35 feet of the tender and 8 or 9 feet of the cab of the engine. He was taken to the hospital and his left leg was amputated. He also sustained injuries to his right foot and was in other ways cut and bruised.

The parties seem to agree that the rule applicable to assumed risk is stated in T. St. L. & W. R.Co. v. Allen, 276 U.S. 165, where the court said:

[illegible]

> "I [illegible] the door, [illegible] and [illegible] the spring. [illegible] door slamming [illegible] tightly and I had to [illegible] the [illegible] to get into [illegible] off both my legs [illegible] and [illegible] and [illegible] was [illegible] I was [illegible] the [illegible] hand [illegible]."

[illegible] leg; that was [illegible] back window on [illegible]; that it was about [illegible] left [illegible] there was [illegible] the cab [illegible] leg was [illegible] and was [illegible]

[illegible] 165, where the court said:

"The plaintiff cannot recover in the absence of negligence on the part of defendant. Seaboard Air Line v. Horton, 233 U. S. 492, 502. And, except as specified in sec. 4 of the Act, the employe assumes the ordinary risks of his employment and, when obvious or fully known and appreciated by him, the extraordinary risks and those due to negligence of his employer and fellow employees. Boldt v. Pennsylvania R. R. Co., 245 U. S. 441, 445; Ches. & Ohio Ry. v. Mixon, 271 U. S. 218. If, upon an examination of the record it is found that as a matter of law the evidence is not sufficient to sustain the essential findings of fact, the judgment will be reversed. C. M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, 474."

The assumption of a risk is an affirmative defense. The burden of proving that an employee assumes the risk is on defendant. (Roberts' Federal Liability of Carriers, 2nd ed., vol. 2, sec. 1021; K. & M. Ry. Co. v. Kerse, 239 U. S. 576; Davis v. Crane, 12 Fed. (2nd) 350.) In Chesapeake & Ohio Ry. Co. v. Winder, 23 Fed. (2nd) 794, it was said:

"*** in order to justify a directed verdict for the defendant on that ground the evidence tending to show such assumption must be clear and uncontradicted."

The reasonableness of the rule of assumed risk has been questioned by some courts, (Hull v. Davenport, 93 Wash. 16; Rase v. St. P. & S. Ste. M. Ry. Co., 107 Minn. 260), but in view of the fact that the defense of assumed risk seems to be preserved by the statute under which this suit is brought, we need not inquire into the merits of these contentions. The further fact, however, that the statute disallows contributory negligence as a defense makes it quite necessary to carefully examine the cases, some of which fail to recognize the fundamental distinction between the defense of assumed risk and that of contributory negligence.

Defendant argues that plaintiff assumed the risk, upon two theories: First, that a servant employed as a brakeman for a carrier in the discharge of his duties is accustomed and required to board moving trains; that experienced men now understand and appreciate the dangers arising therefrom and assume the risk as incident

"The liability cannot recover in the absence of negligence on the part of defendant. Woodward Air Line v. Horton, 233 [illegible] 292, 300. And, except as specified in sec. 4 of the act, the employe assumes the ordinary risks of his employment and, even obvious or fully known and appreciated by him, the extraordinary risks and those due to negligence of his employer or fellow-employees. Scott v. Hanover Ins. Co., 75 [illegible] 3, 441, 442; Chase v. Ohio Ry. v. Dixon, 271 [illegible] 210, 217, and so examination of the record it is found, [illegible] a matter of law the evidence is not sufficient to establish the ordinal finding of fact, the judgment will be reversed. [illegible] Ry. Co. v. Coogan, 271 U. S. 472, 474."

The assumption of a risk is an affirmative defense.

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> "As in order to justify a directed verdict for the defendant on that ground the evidence tending to show such assumption must be clear and uncontradicted."

The reasonableness of the rule of assumption of risk has been questioned by some courts, (Hull v. Davenport, 99 Wash. 16; Hass v. [illegible], 107 Minn. 400), but in view of the fact that the defense of assumed risk seems to be preserved by the statute under which this suit is brought, we need not inquire into the merits of these cases. The further fact, however, that the statute dispenses contributory negligence as a defense makes it quite necessary to carefully examine the cases, some of which fail to recognize the fundamental distinction between the defense of assumed risk and that of contributory negligence.

Defendant argues that [illegible] two theories: First, that a servant [illegible] carrier in the discharge of his duties is assumed and resulted to board moving trains; that [illegible] and exercise the dangers arising therefrom [illegible]

to their employment. Defendant says that plaintiff was the only person directing the movement of the engine at the time of the accident; that plaintiff knew when he gave the order to back up that the engineer would respond to the signal and knew that if he missed his footing on the footboard of the tender an injury to him would probably result, and that this was an ordinary risk of his employment that he assumed as a matter of law. Secondly, defendant says that plaintiff tried to get on the moving tender of the engine by placing his left hand on the handle of the gondola car and his right foot on the tender; that this way of boarding the car created additional dangers; that this manner of boarding the car was plaintiff's own selection and that by this selection he assumed the risk. It is said that this manner of getting on the car was more than mere negligence - it was the creation of an additional hazard and needlessly created a risk of injury; that the particular manner in which plaintiff boarded the car created a new hazard and an "extraordinary risk," the dangers of which obviously were or should have been fully known and appreciated by plaintiff, and that this bars recovery as a matter of law.

The reply to the first contention is that it disregards a material fact which the evidence tended to show, namely, that the increase of the speed of the engine was sudden and accompanied with a jerk. It is true that the evidence is conflicting upon this point, but defendant has expressly waived its right to have this court determine the question of preponderance which, if in its favor, would otherwise require us to reverse the judgment. Plaintiff, it is true, is an interested witness, but we have no right to disregard his testimony on that account, and in particular is this true in view of the undisputed evidence as to the distance which the car travelled after plaintiff fell, together with the conflicti:

[illegible]

evidence of experts who testified for the respective parties as to the time in which the train might have been stopped. The first theory therefore cannot be accepted.

The second theory ignores the distinction that the statute recognizes between contributory negligence and assumed risk. This distinction was recognized by the courts prior to the enactment of this statute. (Narramore v. Cleveland C. C. & St. L. Ry. Co., 96 Fed. 298; St. Louis Cordage Co. v. Miller, 126 Fed. 495; Rase v. N. S. P. & S. S. M. R. R. Co., 107 Minn. 260.) The distinction under the statute was first clearly pointed out in Seaboard Air Line v. Horton, 233 U. S. 492. In that case the plaintiff was an engineer in charge of defendant's engine which was equipped with a device known as a Buckner water gauge. This gauge should have been provided with a guard glass as a part of its usual equipment. Plaintiff was experienced and knew that this guard was absent and knew the function which it was intended to perform. He reported the defect to the roundhouse foreman, who said there were no guards in stock but such a guard would be sent for and that in the meantime plaintiff should run the engine without one. Plaintiff did so and the gauge exploded, fragments of the glass striking plaintiff in the face and injuring him. Upon suit he obtained a substantial judgment. It was argued upon appeal that plaintiff assumed the risk, and the court held that the legislative intent under the Employers' Liability act was that assumption of risk should in all cases not enumerated as being excepted therefrom, have its former effect as a complete bar to the action; that the distinction between assumption of risk and contributory negligence was recognized by the statute; that the distinction was simple, although sometimes overlooked; that contributory negligence included the notion of some fault or breach of duty on the part of the employ

[illegible]

while the assumption of risk, even though the risk was obvious, might be free from any suggestion of fault of the employee; that the dangers which were normally and necessarily incident to the occupation were presumably taken into account in fixing the rate of wages and were therefore assumed by the employee, but that risks not naturally incident to the occupation might arise out of the failure of the employer to exercise due care as to providing a safe place of work and suitable and safe appliances for the work; that such were not assumed unless so obvious that a prudent person would have observed and appreciated them.

The result of the Seaboard Air Line v. Horton case and subsequent cases, is well summed up in Roberts' Federal Liabilities of Carriers, vol. 2, 2nd ed., sec. 831, p. 1606, where the author says:

> "The nature and elements of the doctrine of assumption of risk, as applied to interstate employees of interstate carriers under the federal act, have been well established in a series of controlling decisions by the United States Supreme Court. The risks are of two kinds, ordinary and extraordinary. Ordinary risks are those that are normally incident to the occupation in which an employee voluntarily engages. An employee is conclusively presumed to have knowledge of such risks and assumes injuries arising therefrom. Such ordinary risks are assumed by an employee whether he is actually aware of them or not; for the dangers and risks that are normally or necessarily incident to his occupation are presumably taken into account in fixing the rate of wages. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the carrier to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These are known as extraordinary risks. An employee has the right to assume that his employer has exercised due care for his safety. He is not to be treated as assuming these extraordinary risks arising from defects due to the negligence of the employer unless he has knowledge of them and the danger arising therefrom, or unless the risk and danger are so obvious that an ordinarily prudent person under similar circumstances would have known the risk and appreciated the danger arising therefrom."

The particular cases upon which defendant relies do not sustain the rule for which it contends. In Ches. & Ohio Ry. Co. v. Nixon, 271 U. S. 218, a section foreman, experienced, was required in the course of his duties to go over a track and keep it in repair. He used a velocipede that fitted the rails and

was propelled by his feet, and he had obtained permission to use the machine also in going to his work from his house over a part of the track in his charge. He started from his house as usual and five minutes later was overtaken by a train and killed. He had instructed his own men when on duty that each must rely on his own watchfulness and keep out of the way of danger. The court held that the permission to use the velocipede did not increase the obligation of the defendant and that the same only extended the ordinary rights and the usual risks.

In Gulf, Mobile & Northern R. R. Co. v. Wells, 275 U. S. 455, plaintiff, a brakeman, after he had thrown a switch, ran into a train which was moving at ten miles an hour, caught a grab-iron, but turned his foot on a piece of coal and was thrown to the ground and injured. Plaintiff testified that as he went down the engine gave an unusual jerk. There was no evidence that the engineer knew that the plaintiff was on the train or in a situation where a jerk would be dangerous to him. The court said that plaintiff's statement about the unusual jerk was a mere conjecture and the judgment was reversed.

In Chesapeake & Ohio Ry. Co. v. Leitch, 276 U. S. 429, it was held that a locomotive engineer assumed the risk of being struck by a mail train or a sack hanging from it. This decision was based on Southern Pacific Co. v. Berkshire, 254 U. S. 415. In T. St. L. & W. R. R. Co. v. Allen, 276 U. S. 165, it was held that a plaintiff, who was struck by a car shunted down the track next to that on which he was standing, while checking cars in a switching yard at night and knowing that switching was being done, could not recover because he had assumed the risk. In D. L. & W. R. R. Co. v. Koske, 279 U. S. 7, an employee alighting in the dark from an engine, fell into a ditch, with which he had long been familiar, and it was held that he could not recover because the

was propelled by its feet, [illegible] the [illegible] the tracks in its shoes. [illegible] life minutes later was on [illegible] instructed his [illegible] watchfulness and [illegible] that the reviewing [illegible] obligation of the [illegible] ordinary skill and [illegible].

In [illegible], 29 [illegible], 447, [illegible], a boiler [illegible] was [illegible] a brass-iron, [illegible] to the [illegible] down the engine [illegible] the engineer [illegible] attention [illegible] that [illegible] jectors and the [illegible].

In [illegible], 17 [illegible], 456, it was held that a [illegible] stopper [illegible] stopper by a bell crank [illegible] was [illegible] in [illegible] that a [illegible] must be [illegible] while the vessel [illegible] could not recover [illegible] K. L. Co. v. [illegible], [illegible] from an engine, [illegible] tender, [illegible] could not recover [illegible] the

railroad company was not guilty of negligence and because he had assumed the risk.

These cases are all distinguishable from this one in that in each of them the employee continued in his employment with full knowledge of the risk and danger to which he was exposed, while here, if we accept the evidence of plaintiff (as under the request of defendant we are required to do), then the risk caused by a sudden increase in speed and jerk of the engine was not a risk of which he had or could have had knowledge in time to prevent the injury he received; nor did he have knowledge, nor could he in the exercise of ordinary care have had knowledge, that after he fell the engineer would neglect to stop the train or fail to use due diligence to stop it and that it would drag him for a considerable distance. Nor, in our opinion, is there any merit in the contention that by attempting to get upon the tender of the engine, plaintiff proceeded to board it in an improper way, thus creating an extraordinary risk which he would assume. In the first place, there is no basis in the evidence for a finding that plaintiff was negligent in this respect, and, in the second place, if such evidence was in the record, we are precluded by the terms of the statute from considering it as a complete bar to the action. It was only contributory negligence, a matter which the jury might take into consideration in reducing the amount of damages recovered.

What we have already said we think disposes of the further contentions that defendant was not negligent and that the negligence of plaintiff was the sole and only cause of the injury which he sustained. There is evidence in the record from which a jury could reasonably find for plaintiff with reference to all these contentions, and while ordinarily it is the practice of this court to weigh this evidence and reverse th case the verdict and judgment

[illegible]

[illegible]

[illegible] precluded [illegible]

are clearly and manifestly against the weight of it, that point is not only not made by defendant, but it has been expressly waived with the request that we consider the points merely as matters of law. From that standpoint, we find no error in the record which would require a reversal, and the judgment of the trial court is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

are clearly and [illegible]
not only not [illegible]
with the remarks [illegible]
law. From that standpoint, [illegible]
would require a [illegible]
is therefore affirmed.

[illegible]

O'Connor, [illegible]

35019

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

TERRENCE DRUGGAN,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

263 I.A. 637

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

By this writ defendant seeks to reverse an order entered January 14, 1931, by which he was found guilty of contempt of court and sentenced to jail for a term of one year. The proceeding, so far as the record discloses, began November 7, 1930, when an order was entered giving "Joseph Keating" leave to file a petition charging defendant with contempt of court. On the same day a petition was filed and an order entered that defendant, Terrence Druggan, show cause why he should not be punished for such crime. The petition was signed, "John A. Swanson, State's Attorney, By Harry S. Ditchburne & James Brown, Assistant State's Attorneys." The verification is by Joseph Keating who swears that he has read the petition "by him subscribed;" that he knows the contents thereof, and he "verily believes the same to be true."

On the same day an attachment issued directed to the bailiff which has, however, not been returned. December 8, 1930, Druggan gave bond in the sum of $5,000, and December 18th made a motion to quash the petition and for his discharge, which was overruled. December 18th he filed his answer to the rule. It was in writing and the verification in due form, stating:

> "** that he has read the foregoing answer subscribed by him and knows the contents thereof and has knowledge of all of the facts and that the said answer is true, except as to such matters therein expressly stated to be upon information and belief, and that as to such matters he believes said answer to be true."

The errors assigned and argued relate (1) to the

[illegible]

[illegible]

Defendant in Error,

vs.

[illegible]

[illegible]

Plaintiff in Error.

[illegible]

[illegible]

By this writ [illegible] to review an order entered January 11, 1921, by which [illegible] of contempt of court and sentenced to jail for a term of one year. [illegible] pending, so far as the record discloses, on December 7, 1920, when an order was entered giving "General [illegible] leave to file a petition alleging defendant's [illegible] in court." On the same day a petition was filed and an order [illegible] Terrence Trugeon, who [illegible] for [illegible] such crime. The petition was signed, "[illegible], [illegible] Attorney, by [illegible], [illegible], [illegible] Attorneys." The verification, by [illegible] who swore that he has read the petition "by his subscribing" [illegible] contents thereof, and to "verily believe the same to be true."

On the same day an [illegible] issued directed to the Sheriff [illegible], returnable, [illegible], December [illegible], Trugeon gave bond in the sum of $[illegible], [illegible] December 1 to quash a motion to quash the [illegible] for the [illegible], which was overruled. December [illegible] 1921 [illegible] to the [illegible], it was in writing and the verification in [illegible], stating:

> "as that he has read the foregoing, answer subscribed by him and knows the contents thereof and has knowledge of all of the facts set forth therein, except as to those stated on information and belief, and that as to such matters he believes said answer to be true."

The errors assigned and argued relate (1) to the

alleged insufficiency of the petition or information, and (2) to the sufficiency or insufficiency of the answer.

It is urged that the petition was not filed by leave of court, which would seem to be necessary in such cases. (Kerby v. Chicago, etc., R. Co., 51 Colo. 82; 116 Pac. 150.) It is true that the leave given was to Joseph Keating, while the petition actually filed was that of Swanson as state's attorney. However, the petition of Swanson was verified by Keating, and we think this must be held to be sufficient in the absence of some specific objection in the trial court. The motion to quash seems to have been only general in its nature.

A more serious objection is raised by the contention that the information was defective in that it was not properly verified. The authorities seem to hold that a verification upon mere belief, as was this, is insufficient in cases of this character. It is so held in Parris v. The People, 76 Ill. 274. The leading authority as to the necessity of an affidavit in such cases is The People v. Clark, 280 Ill., 160, where the authorities are reviewed. The court there held an act of the legislature unconstitutional which permitted warrants to issue without an affidavit in form which, if the affidavit was false, would subject the party making same to prosecution for perjury. The court quoted from Myers v. The People, 67 Ill. 503:

> "If informations could be filed upon which a warrant for arrest may issue without affidavit the door would be opened to intolerable abuses."

In The People v. Severinghaus, 313 Ill. 471, a case which, like this, was for contempt of court, the opinion states:

> "On the question whether or not it was incumbent on the State to have the information verified by affidavit, we are of the opinion that such was necessary under the decision of this court in People v. Clark, 280 Ill. 160, and that is so whether the information was filed by the Attorney General, the State's Attorney, or any of their deputies acting for them."

alleged insufficiency of [illegible] or [illegible], [illegible] to the sufficiency or insufficiency of the [illegible].

It is [illegible] [illegible] of court, which would [illegible] [illegible]. In [illegible] v. Gibson, [illegible] [illegible], [illegible] that the leave given was [illegible], and the application actually filed was [illegible] of [illegible]. However, the position of [illegible] was [illegible], [illegible] must be held to be sufficient in the [illegible] [illegible] jection in the trial court. The [illegible] been only general in its [illegible].

A more serious [illegible] that the information was defective in [illegible] verified. The [illegible] more belief, in [illegible] character. It is [illegible] in [illegible], [illegible] 4. The leading authority on the necessity of [illegible] cases is [illegible] v. [illegible], [illegible] are relevant. The [illegible] constitutional [illegible] davit in form which, if [illegible], would [illegible] party making [illegible] from [illegible] v. [illegible], [illegible]

"If informations could be [illegible] on which a warrant for arrest may issue without [illegible] affidavit [illegible] be opened to indefinite abuse."

In The [illegible] v. [illegible], [illegible] which, like this, was [illegible] of [illegible], the opinion [illegible]:

"On the question whether or not [illegible] information [illegible] state to have the information verified by affidavit, we are of the opinion [illegible] necessary [illegible] in this court in [illegible] v. [illegible], [illegible] the information was filed by the [illegible], the [illegible] Attorney, or any of their deputies acting for them."

In that case, however, it was held also that the objection to the information was made too late by defendant because it came after pleading or answering the information and that the defect was thereby waived. To the same effect are People v. Duyvejonck, 337 Ill. 636, and People v. Westbrooks, 242 Ill. App. 339. The State relies on Flannery v. People, 127 Ill. App. 526, affirmed in 225 Ill. 62, but an examination of the opinion in that case discloses that the proceeding while in form for contempt was of a different nature from that disclosed by this record and was as a matter of fact based upon several affidavits as well as a petition, so that the verification of the petition was held not essential. As the defect here appears upon the face of the petition, we think the question of its sufficiency was preserved by the motion to quash. Indeed, in People v. San Filippo, 255 Ill. App. 554, it was held that a similar question was properly preserved by a motion in arrest of judgment such as was made here. Other authorities as to the insufficiency of the verification are Lipman v. The People, 175 Ill. 101; Early v. The People, 117 Ill. App. 608; The People v. Blum, 172 Ill. App. 493.

Defendant further contends that the petition for attachment does not set forth a prima facie case; that it is predicated upon an erroneous theory of law as to certain facts and is fatally defective.

The petition, as already stated, was filed November 7, 1930, and it alleges in substance that on September 16, 1930, a complaint or information was filed charging Terrence Druggan with the offense of being a vagabond as defined in the statute; that the complaint was then on file; that pursuant to the complaint a capias issued and that the alleged vagabond was arrested October 1, 1930, and on the following day admitted to bail in the sum of $10,000, the bail being conditioned upon the appearance of the alleged

In that case, however, it was [illegible] interpretation was made for Jale by [illegible] plaintiff or [illegible] theory waived. To the same effect see [illegible] III. 888, and [illegible] relations on [illegible] IIX. 8, but on [illegible] that the proceeding while in [illegible] nature that dismissed by this [illegible] fact based on [illegible] the validity of the [illegible] defect here [illegible] question of its [illegible] Indeed, in [illegible] that a similar [illegible] the insufficiency of [illegible] IVa IXX. 101; [illegible] [illegible] 172 [illegible] [illegible]

[illegible] attorney does not [illegible] predicated upon [illegible] and is fatally [illegible]

The position, as already [illegible] 1920. [illegible] [illegible] the effects of [illegible] [illegible] [illegible] and on the following day [illegible] the bail bond [illegible]

vagabond who was found in the University hospital in the city of Chicago. The particular facts construing the contempt are stated to be that on October 2nd, October 8th and November 6th, 1930, defendant caused his counsel and his physician to falsely represent to the court that he was ill and could not appear in court without danger to his health; that postponements of the cause were secured on October 2nd and 8th by these representations; that on November 6th, notwithstanding these representations, "your Honor entered an order forfeiting the bond of the defendant and issued another capias for the arrest of the said defendant." It is further averred that on the day following, shortly after midnight, officers of the court attempted to execute the capias in the rooms of the alleged vagabond at the Morrison hotel in Chicago, but found that he was not in the hotel; that the capias was not executed, and defendant is not now in custody.

The petition avers that defendant was well able to appear at these times; that the misstatements made for the purpose of deceiving the court constituted a contempt of court and were calculated to and tended to interfere with, impede, obstruct, thwart and hinder the due administration of justice by the court in the hearing and determining of the issues concerned in the cause then pending and "constituted an indirect criminal contempt of this court."

Defendant points out that nowhere in the petition is it alleged that the court at these times had jurisdiction of the cause in which defendant was charged with the offense of being a vagabond, and it is urged that there is no allegation that the alleged contemptuous conduct took place within the venue or territorial jurisdiction of the court. Defendant cites The People v. Goodwin, 263 Ill. 99, where the general rule as to the necessity

vagabond who [illegible] Chicago. The part [illegible] to be [illegible] defendant [illegible] over to the [illegible] without [illegible] were [illegible] that on November [illegible] "your honor [illegible] and issued [illegible] it is in [illegible] midnight, [illegible] in the rooms of [illegible] Chicago, but [illegible] was not executed, and [illegible] appear at those [illegible] pose of [illegible] were [illegible] forwarded [illegible] in the hearing and [illegible] cause this [illegible] of this court."

[illegible] it [illegible] cause [illegible] vagabond, and [illegible] alleged [illegible] torial jurisdiction of the court. [illegible] Goodwin, 265 Ill. 34, [illegible]

of such averment in an indictment or complaint is stated. There is authority, however, to the effect that allegation as to the venue is not always material in a proceeding for contempt of court. Binkley v. U. S., 282 Fed. 244; Farmers State Bank v. State, 13 Okla. Crim. 283, 164 Pac. 132, L. R. A. 1917 E, 551.) It is, however, necessary to allege and prove that the court had jurisdiction of the person of defendant and of the subject matter of the cause in connection with which the alleged contempt was committed. This petition does not so allege nor state facts from which jurisdiction would be necessarily inferred. Whether the vagrancy complaint was sufficient in form or substance to vest the court with jurisdiction does not appear from the petition, nor does the petition state facts from which it may be determined that the capias issued was in due form, or state the terms and conditions of the defendant's recognizance. Moreover, the sworn answer of defendant which, as we will later see, must be assumed to be true, sets up certain facts which would seem to negative the jurisdiction of the court.

Defendant in his answer says that when he was arrested he employed counsel, whom he requested to present to Judge Lyle a petition on his behalf for a change of venue, and he avers on information and belief that such petition was presented by his counsel and filed in the vagrancy case on October 2, 1930, and duly called to the attention of the court. He further avers that the petition for change of venue was not acted upon by the court but that "the same is still pending and undisposed of." The answer is alleged to be made without the intention to waive this petition or defendant's right to a ruling on it, and the attention of the court is again directed thereto.

As the record shows, however, that said petition for a change of venue was finally granted in the cause, we will presume

of [illegible] there is nuisance, however, [illegible] the crime is not [illegible] of [illegible] court. Ilgenfritz v. [illegible], [illegible] Ohio. Crim. App. 1964 [illegible], [illegible] 1964, [illegible]. However, necessary to [illegible] jurisdiction of the person of [illegible] defendant [illegible] the cause in connection with which [illegible] conviction was sought. This notion derives from a [illegible] from which jurisdiction would be necessarily inferred. We have the warrency complaint was sufficient [illegible] or [illegible] with the court with jurisdiction over [illegible] petition, nor does the petition state a cause for [illegible] that has been issued was in the [illegible] defendant's responsibilities. [illegible] which, as we will later see, [illegible] certain [illegible] the jurisdiction of the court.

[illegible] he employed counsel, [illegible] a petition on his behalf to [illegible] information and belief [illegible] counsel and filed in the [illegible] daily called to the [illegible] the petition for change of venue [illegible] but that "the same is still [illegible]." The answer is alleged to be made [illegible] or defendant's right [illegible] court is within [illegible].

As the record shows, [illegible] for a change of venue was [illegible] [illegible] still [illegible]

that it was in proper form. It therefore affirmatively appears from this record that at the time of these alleged contempts there was pending in the court of Judge Lyle a petition for a change of venue which divested him of jurisdiction to hear the cause. The authorities are uniform and consistent as to the duty of a trial judge in such a situation.

In Clark v. The People, 1 Scam. 117, where the court denied a change of venue to one of several defendants indicted for the crime of arson, the court said that the decision "was clearly erroneous" and that the constitution secured to every person charged with an offense a trial by jury, and in order that the trial might be a fair and impartial one, this right to a change of venue had been given and was most important. The opinion continues: "And when, by petition, verified by affidavit, the accused brings himself within the requisitions of the statute, the obligations of the judge or court to allow i , is imperative, and admits of the exercise of no discretion on account of any supposed inconvenience that may result from the exercise of the privilege."

In Simpson v. Simpson, 165 Ill. App. 51^, notice of an application for a change of venue on account of alleged prejudice of the trial judge was given on November 12, 1910. The petition was filed November 14th and was considered and taken under advisement. November 17th complainant presented a petition for alimony pendente lite, and the court entered an order allowing the same as well as solicitor's fees. Upon appeal the decree was reversed, the opinion of the court stating:

> "Where the application for change of venue is made on account of the prejudice of the trial judge, the statute gives no discretion, but such judge if the petition is in proper form and duly verified, must grant the petition and allow the change of venue. After the petition is presented, the judge named therein has no power to render any further order therein, except such as may be made in connection with the one which allows the change of venue."

that it was in proper form. [illegible] from [illegible] was pending in the court [illegible] venue which [illegible] authorities are [illegible] judge in such a situation.

In [illegible], [illegible] denied a change of venue [illegible] the crime in [illegible] for the crime of arson. The court [illegible] "erroneous" and that the [illegible] charged with an offense [illegible] trial might be a fair and [illegible] of venue had been [illegible] tinued. "And when, by [illegible], [illegible] owned [illegible] obligation of the judge [illegible] ability of the accused to do [illegible] inconvenience [illegible] proceeding."

In [illegible], [illegible] application for a change of venue [illegible] of the trial judge was [illegible] 18, 1971. The petition was filed [illegible] ment. December 17th [illegible] [illegible] [illegible] well as [illegible] opinion of the [illegible]

"[illegible] ground of the [illegible] discretion, [illegible] daily [illegible] venue. After [illegible] [illegible] [illegible] [illegible] [illegible] of venue."

In Glos v. Garrett, 219 Ill. 208, the court, under the circumstances there appearing, refused to reverse for refusal of the judge to grant a petition for change of venue, but said:

> "The obligation of a judge to allow a change of venue to one who brings himself within the provisions of the statute is imperative and admits of the exercise of no discretion. (Clark v. People, 1 Gram. 117.) But the statute requires reasonable notice, and what is reasonable notice in a particular case must be left to the discretion of the judge to whom the application is made, and that discretion will not be interfered with unless abused. (Berry v. Wilkinson, 1 Gram. 164.) The cause had not previously been on the calendar of the judge who heard it, but appellants had received notice on July 6 that the exceptions would be called up before him on July 10. We cannot say that it was an abuse of discretion on the part of the court to hold that notice for one day under such circumstances was insufficient, and the same must be said of the decision that there was an emergency justifying the setting aside of the rule of the court."

In Witherstine v. Snyder, 231 Ill. App. 251, it was held that the question of error in denying a motion for a change of venue on the ground of prejudice had not been preserved, as required, by the bill of exceptions or certificate of evidence. The court, however, said:

> "Where the application for a change of venue is made on account of the prejudice of the trial judge, the statute gives no discretion, but such judge, if the petition is in proper form and duly verified, must grant the petition and allow the change of venue. After the petition is presented the judge named therein has no power to render any further order therein, except such as may be made in connection with the one which allows the change of venue. Simpson v. Simpson, 165 Ill. App. 615; Glos v. Garrett, 219 Ill. 208. A change of venue is not a matter of practice but is a substantial right of a litigant. Feigen v. Shaeffer, 256 Ill. 493."

In Davies v. Davies, 247 Ill. App. 313, the entry of an order vacating a prior order allowing temporary alimony after a change of venue had been allowed, was held erroneous. In that case the opinion of the court points out that section 11, chapter 146, provides that a change of venue may be made "subject to such equitable terms and conditions as safety to the rights of the parties may seem to require, and the judge in his discretion may prescribe." The opinion continues:

"An order relating to alimony does not come within the statutory equitable terms and conditions which the court may impose. These must relate to the safety of the rights of the parties. Vacating the order allowing the complainant alimony does not relate to the safety of the rights of the parties. The court had no authority to enter such an order. Mapes v. Scott, 94 Ill. 379; Bellingall v. Duncan, 2 Gilm. (Ill.) 591."

The petition here does not allege that any matters were pending before the trial judge after the filing of this petition for a change of venue which he might properly consider or which he had authority or jurisdiction to hear. The attorney for the People suggests that a change of venue is not permissible in a proceeding for contempt. That is true, but the statute does provide for and, upon proper petition, compel the transfer of a cause where the accused is charged with being a vagabond upon the filing of a petition for a change of venue in due form. Defendant could not well be guilty of constructive contempt with reference to a matter concerning which the court had been divested of jurisdiction. The People suppose a case in which a defendant would appear in court and offer some personal insult to the presiding judge and ask whether a defendant might not properly in such a case be punished even though a petition for a change of venue had been filed. We do not doubt the power of the court under such circumstances to protect himself from such indignities; but this argument begs the question here at issue. Defendant is not charged with a direct contempt in the presence of the court. He is charged with an indirect contempt by causing false information to be conveyed to the court in a matter which it is not shown the court had jurisdiction to hear. If the court had jurisdiction and if defendant in fact caused such false information to be conveyed, then we have no doubt such conduct would constitute a contempt. (Welch v. Barber, 52 Conn. 147, 52 Am. Rep. 567.) The petition was vulnerable in these respects and the motion to quash should have been granted.

"An order relating to [illegible] not [illegible] statutory eligibility [illegible] of [illegible] [illegible] imports. Even **must** [illegible] to the [illegible] of [illegible] parties. Vacating the order [illegible] the [illegible] does not relate to the [illegible] of the [illegible] **parties.** The court had no authority to [illegible] an order. [illegible] **pse.** v. [illegible], 94 [illegible]. 379; [illegible] v. [illegible], [illegible] [illegible].

The petition [illegible] were [illegible] before the [illegible] tion for a change of venue [illegible] which he had authority or jurisdiction to [illegible]. The [illegible] the People suggests that a change of venue is not permissible in proceeding for contempt. That is true, but [illegible] vide for [illegible] **petition** [illegible] where the accused is charged [illegible] of a petition for a change of venue in [illegible]. [illegible] not well be guilty of [illegible] matter concerning which the court had [illegible] jurisdiction. The People [illegible] court and other some [illegible] ask whether [illegible] not properly, in such a case be published even though a petition for a change of venue had been filed. We do not doubt the power of the [illegible] such circumstances to protect itself from any [illegible]; [illegible] begs the question here [illegible] direct contempt in the presence of the court. It is [illegible] an indirect contempt by [illegible] the court in a manner which it is [illegible] jurisdiction to hear. If the [illegible] jurisdiction [illegible] that caused such [illegible] be [illegible], there is no doubt such conduct would constitute contempt. (People v. [illegible], 52 Cal. App. 147, 50 Am. Dec. 627.) The petition was [illegible] in these respects and the motion to quash should have been granted.

The court erred in refusing to do so.

The judgment must be reversed for another reason, namely, that the sworn answer of defendant purged the alleged contempt and defendant should have been discharged upon his answer. The proper procedure in trials for constructive contempt has been set forth in a long line of decisions by our Supreme court, the last of which is The People v. McLaughlin, 334 Ill. 354, a case upon which both parties here rely. In that case McLaughlin was found guilty of contempt by the Criminal court of Cook county, the charge being that he had attempted to intimidate a witness who was about to testify in a case then on trial in that court. There, as here, an answer was filed in writing and verified by defendant. In that case, however, unlike this, the State filed written interrogatories which the defendant answered under oath. In his answer to these interrogatories McLaughlin expressly denied the alleged conduct which constituted the contempt. Our Supreme court said:

> "The right to punish an offender for contempt of court is a right inherent in the Criminal court of Cook county, and when the act constituting such contempt is committed in the presence of the court, the court has the right to deal summarily with the offender and punish him without the hearing of any evidence. In such case the court acts upon its own knowledge. But where the contempt is not committed in the presence of the court, the court can act only upon a hearing and upon evidence. The distinction between criminal and civil contempts has been recognized in this jurisdiction since the decision in Crook v. People, 16 Ill. 534, and has been declared in numerous decisions since. When the contempt consists of something done or omitted in the presence of the court tending to impede or interrupt its proceedings or lessen its dignity, or out of its presence in disregard of abuse of its process, the proceeding is punitive or criminal, and the penalty is inflicted by way of punishment for the wrongful act and to vindicate the authority and dignity of the People as represented by their judicial tribunals. In such cases the defendant is tried upon his answer, alone. No other evidence may be heard. If the party charged shows by his answer under oath that he is not guilty of the contempt charged his answer is conclusive. If the answer is false the remedy is by indictment for perjury. The answer must be taken as true, and if sufficient to purge the party of the contempt he is entitled to be discharged. (O'Brien v. People, 216 Ill. 354; Hake v.

The court erred in refusing to do so.

The judgment must be reversed for another reason, namely, that the sworn answer of defendant purged the alleged contempt and defendant should have been discharged upon his answer. The proper procedure in trials for constructive contempt has been set forth in a long line of decisions by our Supreme court, the last of which is The People v. Kohn, 419 Ill. 384, a case upon which John's case more truly. In that case Kohn-Gillis was found guilty of contempt by the Criminal Court of Cook county, the charge being that he had attempted to intimidate a witness who was about to testify in a case then on trial in that court. There, as here, an answer was filed in writing and verified by defendant. In that case, however, unlike this, the trial filed written interrogatories which the defendant answered under oath. In his answer to those interrogatories he explain[illegible] [illegible] the alleged conduct which constituted the contempt. In [illegible] the court said:

"The right to punish an offender for contempt of court is a right inherent in the tribunal court of Cook county, and upon the act constituting such contempt is committed in the presence of the court, the court has the right to deal summarily with the offender and punish him without the hearing of any evidence. In such case the court acts upon its own knowledge. But where the contempt is not committed in the presence of the court, the court can act only upon a hearing and upon evidence. The distinction between criminal and civil contempts has been recognized in this jurisdiction since the decision in Ethan v. People, 16 Ill. 494, and has been followed in numerous decisions. When the proceeding is for the purpose of punishing the offender for the wrong done to the court, resulting in impede or interrupt its proceedings or lessen its dignity, or out of its presence in disregard or abuse of its process, the proceeding is punitive or criminal, and the remedy is included by way of punishment for the wrong done to the tribunal. [illegible] the proceeding is for the benefit of a party to a civil suit, the remedy is by way of punishment for the wrong done to the opposite party, and the contempt is civil and to be tried [illegible]."

People v. Kohn, 419 Ill. 384; Hale v.

People, 230 id. 174; Rothschild & Co. v. Steger Piano Co., 256 196; People v. Seymour, 272 id. 295; People v. McDonald, 314 id. 548.) The plaintiff having by his answer denied all the acts charged against him and all wrongful intent in his conversation with Neumann was entitled to be discharged."

That decision is final and conclusive in this case. The answer of defendant in this case avers that he was ill; that he was examined by and acted upon the advice of a reputable physician; that his ailments were diagnosed to be "active productive bronchitis and inflammation of the gall bladder, and recurrent appendicitis, and prostitis and acute intestinal disturbances." He says that such was the diagnosis not alone of his own physician but also of Dr. Sloan, a licensed physaician and surgeon, who visited him under the direction of the Federal government in connection with litigation then pending against him in the United States District court. He expressly disclaims all intention to impede, obstruct, hinder or interfere with the course of justice as conducted in the court of Judge Lyle. If the affidavit is true, he is not only not guilty, but he has been very much wronged. If it is untrue, the State has a remedy much more drastic than a prosecution for contempt, namely, to procure from a grand jury an indictment of defendant for perjury.

The order is reversed.

REVERSED.

O'Connor, P. J., and McSurely, J., concur.

[illegible]

[illegible]

The author of [illegible] of a severe [illegible] ill; and he was [illegible] by [illegible] [illegible] sion; but his illness [illegible] [illegible] chronicity of [illegible] [illegible], [illegible] personality, and practitioner [illegible] says that [illegible] also of Dr. [illegible], [illegible] him under the treatment [illegible] with Digitalis. [illegible] trial court. [illegible] [illegible] strict, [illegible] in the [illegible] only not [illegible], but [illegible] [illegible] true, [illegible] for [illegible] of deformity [illegible].

The order is reversed.

[illegible]

[illegible]

35093

GRACE B. FICKENSHER,
Appellee,

vs.

PAUL STUNKEL et al.
On Appeal of Thomas J. Grady,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by Thomas J. Grady, defendant trustee in a subordinate trust deed, from a decree of foreclosure. The cause was heard on objections to the report of the master to whom the cause had been referred, which objections stood as exceptions before the chancellor. The exceptions were overruled and a decree entered as recommended. The decree allowed $1000 for solicitor's fees, and it is argued that this was error because that amount was not claimed in the pleadings, because the evidence was insufficient, and because the allegations and the proof did not warrant the relief granted.

The trust deed was attached to the bill and made a part of it. The deed provided that in case of foreclosure the grantors would pay all expenses and disbursements "including reasonable solicitor's fees," and further that these and other charges should be additional liens upon the premises. The bill alleged, "There is due complainant a reasonable sum as solicitor's fees, to be fixed by the court," and prayed for an accounting and that defendants should be required to pay the sum found due "including solicitor's fees."

Upon the hearing evidence was offered as to the amount of work necessarily performed by the solicitor in connection with the foreclosure, and as to the customary and usual charge for such services.

GEORGE E. [illegible],
appellee,

vs.

PAUL [illegible] et al.,
Co[illegible] of [illegible],
appellants.

[illegible]

[illegible]

This is a [illegible] action, [illegible] the main issue in a subordinate issue [illegible] the [illegible] case was based on [illegible] the [illegible] the court had been [illegible], [illegible] before his [illegible] [illegible] entered as [illegible] [illegible] lies, and it is [illegible] [illegible] not claimed in the [illegible], [illegible] and however the [illegible] [illegible] grounds.

The trial [illegible] of it. The [illegible] would pay all [illegible] [illegible] collector's fees," and [illegible] be additional fees [illegible] due [illegible] by the court," and "prayed" [illegible] should be [illegible] fees."

[illegible] of work [illegible] the [illegible] [illegible] services.

The contention of appellant seems to be that a specific sum should have been claimed in the bill and that the evidence was insufficient because there was no proof of the specific number of hours of labor which the solicitor for complainant performed in connection with the foreclosure. There is no merit to either contention.

A receiver was appointed pending the foreclosure, and the decree provided that the court should retain jurisdiction of the cause and the rents, issues and profits of the premises after the filing and confirmation of the master's report of sale, that in case of a deficiency, judgment for the amount of same should be entered against Paul Stunkel and Hedwig Stunkel, two of the defendants whom the court found to be personally liable. The decree also provided that such judgment should be satisfied out of the rents, issues and profits accruing during the period of redemption after the payment of receivership expenses.

It is contended in behalf of appellant that this provision of the decree was erroneous, on the authority of Schaeppi v. Bartholomae, 217 Ill. 105, Standish v. Musgrove, 223 Ill., 500; Longley v. Wilk, 171 Ill. App. 419; Stevens v. Pearson, 202 Ill. App. 22; Baldwin v. Tuttle, 215 Ill. App. 57. All these cases hold that a provision in a decree of sale which provides for the payment of the rents, issues and profits of the premises foreclosed during the period of redemption to the purchaser at the sale, is erroneous although the purchaser may be the owner of the trust deed and notes and the deed may specifically provide for such payment. The reason for that rule is that the purchaser at a foreclosure sale takes under the decree of the court and not under the provisions of the trust deed. The trust deed in this case, however, expressly conveys "all rents, issues and profits of said premises" as security for

The construction of a [illegible] : [illegible] for that a specific sum should have been claimed in the [illegible] and that the evidence was insufficient however. There was no [illegible] of the specific sum of money of later w[illegible] for the [illegible] settlement in connection with the [illegible]. There is no [illegible] to either construction.

A [illegible] was moreover [illegible] the interference, and the decree provided that the [illegible] should [illegible] of the cause and the [illegible], issues [illegible] the preliminary after the filing and confirmation of the [illegible] report [illegible], but in case of a definitive, that [illegible] for [illegible] entered against [illegible] and every [illegible], two of the defendants who the court [illegible] to be [illegible]. The decree also provided that such [illegible] should be [illegible] out of the [illegible], issues and profits according [illegible] the payment of reasonable expenses.

It is contended in behalf of appellant that this provision of the decree was erroneous, or the [illegible] of [illegible] Earthplowe, 217 Ill. 1-5, [illegible] v. [illegible], [illegible], 5; Langley v. Fike, 177 Ill. [illegible], 415; [illegible] v. [illegible], 84 Ill. [illegible], 28; Baldwin v. Curtis, 115 Ill. [illegible], 82. [illegible] cases [illegible] a provision in a decree of sale which provides for the payment of the rents, issues and profits of the premises [illegible] during the period of red[illegible] in the redemption [illegible] Ill. [illegible] although the purchaser may be the owner of the first lien and notes and the [illegible] specifically provide for [illegible]. The reason for that rule is [illegible] the purchaser [illegible] under the decree of the court and not under the provisions of the trust deed. The trust deed in this case, however, expressly conveys "all rents, issues and profits of said premises" as security for

the performance of the covenants and agreements contained in the trust deed. In this respect this case is distinguished from the cases upon which the appellant relies. The distinction is pointed out and the cases reviewed in Straus v. Bracken, 242 Ill. App. 122, and it is unnecessary to repeat here what is there said.

It is urged that Coleman v. Mulcahey, 334 Ill. 64, is contrary to Straus v. Bracken. While the opinions in these two cases disclose a diversity of views on some points, the conclusions are not inconsistent, if we remember that the cases are distinguishable upon the facts. In Straus v. Bracken, the opinion, after reciting certain provisions of the trust deed, says: "There can be no question but that the above provisions constitute a pledge and mortgage of the rents, issues and profits, under the authority of the cases cited." In Coleman v. Mulcahey, the opinion states, "The decree in the instant case specifically found that the trust deed under which the foreclosure proceeding was had did not pledge the rents and profits issuing out of the land either before or after foreclosure."

No case is cited, and we think there is no well considered case in Illinois holding that where the trust deed specifically conveys the rents, issues and profits as security for the debt, the mortgagee is not entitled to the same (as against the holder of the equity) upon a judgment entered for a deficiency shown to be due after sale. Moreover, the record does not disclose that this defendant appealing is the owner of the equity. In the absence of affirmative proof of such ownership he seems to be without standing to urge this point. (Kehm v. Mott, 187 Ill. 519; Cont'l & Comm. Tr. & Savings Bank v. Leven, 213 Ill. App. 310.)

The decree is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

the performance of the [illegible] contained in the trust deed. In this [illegible] was to distinguish from the cases upon which it [illegible] relied. The distinction is carried out and the cases reviewed in [illegible] v. [illegible], [illegible] Ill. App. 147, and it is unnecessary to [illegible] it in two words.

It is [illegible] that [illegible], [illegible] Ill. 34, is contrary to [illegible] v. [illegible]. While [illegible] we find there two cases disclose a [illegible] of views on [illegible] the conclusions are not inconsistent, it [illegible] the vitiating-able upon the [illegible]. In [illegible], [illegible], the [illegible], after recalling certain or visions of [illegible], says: "There can be no question but [illegible] the [illegible] conditions a mortgage of the [illegible] the [illegible] of the case cited." In [illegible], [illegible], the [illegible], "The decree in the instant case [illegible] that the trust deed under which the [illegible] foreclosure."

No case in [illegible], so far as [illegible] in so well considered case in Illinois holding that under the trust deed specifically covering [illegible] and rights as security for the debt, the mortgagee is not entitled to the same (as against the holder of the equity) upon a [illegible] entered for a deficiency above to be due after sale. Moreover, [illegible] does not disclose that this deficiency [illegible] in the order of [illegible]. In the absence of [illegible] of [illegible] to be without standing to [illegible]. [illegible], 2 [illegible] 1[illegible]; [illegible] v. [illegible], 33 Ill. App. 1[illegible].)

The decree is affirmed.

AFFIRMED.

O'Connor, J. P., and McSurely, J., concur.

35107

JULIUS MEYERHOFF, Administrator of the Estate of Solomon M. Meyerhoff, Deceased,
Appellee,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

263 I.A. 537

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant Railroad company from a judgment for $2000 entered upon the verdict of the jury in an action brought by the administrator under the statute for allegod negligence which (as it is said) caused the death of plaintiff's intestate on June 29, 1929.

The declaration in its several counts averred that at the time and place in question the deceased was in the exercise of due care, and that defendant was negligent generally in the management of its train and in particular in failing to maintain a proper lookout or to give timely warning, and in that its watchman failed to lower the crossing gates. Defendant filed a plea of the general issue and at the close of all the evidence made a motion for a directed verdict, which was denied, and after the return of the verdict a motion for a new trial, which was overruled.

It is argued that the verdict is against the manifest weight of the evidence, and that the court erred in refusing to direct a verdict for defendant, in refusing certain instructions requested by defendant and in failing to grant a motion for a new trial.

An examination of the instructions given and refused discloses that the jury was quite fully and accurately instructed as to the law applicable to the case, and while some of the instructions offered by defendant and refused are not, perhaps,

[illegible]

JULIUS A. [illegible], administrator of the
Estate of Solomon E. [illegible], Deceased, [illegible],
Appellee,

vs.

[illegible]
a corporation,
Appellant.

[illegible]

M. [illegible] [illegible]

[illegible]

a judgment for [illegible] [illegible]
tion brought by the administrator [illegible]
negligence action [illegible] [illegible]
interests on June 20, 1[illegible].

[illegible]

at the time and place [illegible] was [illegible]
of due care, [illegible]
management of its train [illegible] [illegible]
a proper look-out [illegible] [illegible]
man [illegible] [illegible]
the general issue [illegible]
for a directed verdict, [illegible] [illegible]
the verdict [illegible]

[illegible]

weight of the evidence, [illegible]
direct a verdict [illegible]
separated by [illegible]
trial.

[illegible]

[illegible]
as to the law [illegible]
attempt to off [illegible]

subject to criticism, the subject matter of the same was fully covered by other instructions and it was therefore not reversible error to refuse the same. (Morrison v. Flowers, 308 Ill. 198; Carson, Pirie, Scott & Co. v. Chicago Railways Co., 309 Ill. 353; Central Ill. Service Co. v. Deterding, 331 Ill. 286.)

The controlling question in the case is whether the verdict of the jury is clearly and manifestly against the weight of the evidence. If it is, a new trial should have been granted on that account. The facts in the case appear to be as follows:

The deceased, then 82 years of age, was at the time and place in question struck by a suburban train of the defendant while crossing in an easterly direction on the south side of 75th street at the intersection of the same with Exchange avenue in Chicago. Exchange avenue is a public street extending north and south and is 95 feet wide between the building lines. 75th street extends east and west. The tracks of the defendant Railroad company are laid in the center of Exchange avenue. There are two tracks lying parallel to each other. On the westerly track south-bound trains run and on the easterly north-bound trains. These trains are operated by electricity. West of the tracks there is a north and south driveway and east of the tracks a similar driveway. West of the tracks in Exchange avenue is a southbound street car track which makes a swing around at 75th street and crosses from the west side of Exchange avenue to the east side of 75th street. There are also eastbound and westbound street car tracks in 75th street which cross the railroad tracks at this intersection. There is also a northbound street car track east of the railroad in Exchange avenue, and Exchange avenue is intersected by Saginaw avenue, another public street, which extends in a north-easterly and southwesterly direction and comes into Exchange avenue

[illegible] subject to criticism, the majority [illegible] covered by [illegible] interrupted [illegible] [illegible] error to refuse the case. [illegible] Journal, [illegible] 1897; Carson, [illegible] Corporation Counsel [illegible] v. [illegible], [illegible] Co. [illegible] 111, Illinois [illegible] 1901 [illegible].

The contributing [illegible] verdict of the jury is [illegible] of the evidence. [illegible] on that account. [illegible]

The decision [illegible] and alone [illegible] while crossing in a [illegible] attempt [illegible] Chicago. [illegible] and south and in the first mile between the [illegible] street [illegible] and west. [illegible] commerce are [illegible] tracks lying parallel to [illegible] found [illegible] trains are operated [illegible] north and south driveway and [illegible] way. [illegible] car track [illegible] from the [illegible] street. [illegible] in 1898 [illegible] tions. [illegible] railroad in [illegible] [illegible] manner [illegible] [illegible] [illegible]

at an angle west of the railroad tracks. The intersection at this point was protected by gates on each end of 75th street. These gates were operated from a tower by an employee of the defendant company. The tower was located south of 75th street in the middle of Exchange avenue. The towerman controlled three sets of gates, namely, the north gates, the front or center gates and the south gates. These gates were operated by levers, and in the operation of the three sets of gates six lever operations were required. The towerman got his signals of the approach of trains by an automatic buzzer which would sound when an approaching train was a distance of 2,000 feet from the crossing.

The deceased was in the act of crossing the intersection on the south side of 75th street when he was struck by one of defendant's suburban trains approaching from the north, receiving injuries which resulted in his immediate death. It is plaintiff's theory of the case that the gates were not lowered as this train approached at the time in question, and when deceased undertook to cross, but were lowered immediately after he had entered upon the right of way, and plaintiff offered evidence tending to establish this fact. On the other hand, it is the theory of defendant that the gates were lowered in the usual manner when the train approached but that deceased, disregarding this, passed under the gates and went onto the tracks where he received his injuries.

The accident occurred June 29, 1929, at about 7:15 p. m., standard time. The tracks of the railroad company are practically straight at this point, and the witnesses agree that a pedestrian in the situation in which deceased was at the time he received his injury would have a full view of any approaching train.

As already stated, the deceased at the time was 82 years of age, but the evidence is to the effect that he was in

[illegible]

[illegible] this point was [illegible]

There [illegible] defendant's [illegible]

the [illegible]

[illegible] sets of [illegible]

and [illegible]

the operation of the [illegible]

required. The [illegible]

by an [illegible] was a distance of 5,000 feet from the crossing.

The [illegible] ion on the south side of [illegible] defendant's [illegible] injuries which resulted in his [illegible]. It is [illegible] theory of the case that [illegible] approached at the time of [illegible] to cross, but were [illegible] the right of way, the [illegible] alon this fact. [illegible] that the [illegible] approached but not [illegible] gates and went onto the [illegible].

The [illegible] p. m., standard time. The [illegible] practically [illegible] condition in the [illegible] received his [illegible] [illegible].

As already [illegible] years of age, but the [illegible]

good health, seldom sick, and an active man for his age. He followed the business of a tailor's broker and was active in it up to the time he died. His earnings for the last year of his life were about $2,000. He wore glasses but his eyesight was fairly good. He could hear well and was in full possession of his mental faculties.

Plaintiff produced two eye-witnesses. One, Mr. Jeremiah, testified that he was standing near the southwest corner of the intersection, but that although he did not see the deceased before he was killed, he saw deceased at the time the train hit him. He says:

> "When I first saw him he was by the track. He was within that close when it hit him (indicating.) When I saw him he would be about probably 18 inches from the rail. He was walking toward the rail, walking east."

The witness says that he heard a commotion, the brakes were set, the train was coming, and when he looked around he saw "the old gentleman there and just then the train hit him." To the question with reference to whether the gates were going down at the time the witness replied, "Well, to tell the truth, the gates must have been bouncing up and down," and further, "The gates must have been down, they were bouncing, they were gates in action, giving a movement like that (indicating) when I went to him, and the train just hit him." He further says that the gates were still in motion when the accident happened. On cross examination he said that he did not notice the deceased as he entered upon the railroad tracks and that he could not say whether the gates were down when the deceased crossed the tracks; that he was not looking that way; that he did not know whether the deceased looked for the train or not before he was struck; that he did not know what the deceased was doing nor whether he was listening or looking.

Another witness, Mr. Greenberg, produced by plaintiff,

good health, and [illegible] . [illegible] lowed the [illegible] of a relic [illegible] to the time he died. [illegible] years of his life were about [illegible]. In [illegible] a year, it was taking root. He could look [illegible] of its mental faculties.

Although [illegible] mind, [illegible] the interposition, but [illegible] fore he was [illegible], he was [illegible] the train [illegible]. He says:

> "When I first saw him [illegible] that close upon it with [illegible]. When [illegible] could be [illegible] towards the rail, waiting [illegible]."

The witness [illegible] were set, the train was so [illegible], the [illegible] "the old gentleman there had just [illegible] the train hit him." In the question with reference to what [illegible] time the witness replied, "Well, [illegible] have been [illegible] and love," and further, "The [illegible] been down, they were [illegible]. They were [illegible] movement like that (indicating) when [illegible] that hit him." In further cross [illegible] when the engineer [illegible] did not notice the deceased [illegible] and that he could not [illegible] ceased crossing the [illegible] he did not know what or who deceased [illegible] before he was struck; [illegible] doing but [illegible] he was [illegible].

Another witness, [illegible], [illegible] by [illegible],

says that he was ready to cross Exchange avenue and 75th street; that a train was coming and he had to wait; that he was attracted by the sudden jamming of the brakes of the train, and looking forward he saw a man walking toward the rail; that the deceased might have been about three feet from the rail at the time he saw him walking east. He says: "They were just lowering the gates -- just started lowering down the gates when I noticed the jamming of the brakes. This man was still walking toward the track, inside the gates. It was seven or eight feet -- ten feet at the most from the west rail of the southbound track to where the gates are over there." He says that the did not hear any bell, whistle or warning signal; that he was on the northwest corner of 75th street; that he thought the train was traveling about 30 or 35 miles an hour. This witness on cross examination said that he saw the deceased just about "half way between the rail and the gates;" that was the first time he saw him; that he did not know what the deceased was doing but that he saw him walking.

Defendant produced the motorman of the train in question who testified that at the time of the accident he was sitting in the cab compartment for the motorman on the right hand side of the train; that he was on the lookout as his train approached 75th street; that the last stop before the accident was at the South Shore station, the next station north, which was approximately a half mile from 75th street; that as he approached 75th street he reduced the speed of the train to approximately 15 miles an hour; that as he came within a distance of about 50 or 60 feet of 75th street he saw a man bending under the gate at the post or support of the gate; that he immediately blew two short blasts of the whistle; that the deceased turned around slowly and looked towards him; that at that time he was about 15 feet from where

were [illegible]; [illegible] that a train was coming [illegible] the tracks; [illegible] by the motion [illegible] of the locomotive [illegible] looking [illegible] was [illegible] the train; [illegible] the engineer might have been about [illegible] the tracks. The time he saw him walking east. He says: "They were just [illegible] the tracks -- that stopped [illegible] the train [illegible] of the brakes. That man [illegible] walking toward [illegible] train, [illegible] the tracks. It was seven or eight feet -- ten feet or two feet from the rail of the northbound track [illegible] over there." He says that the [illegible] warning signal; that he was on the northwest corner of 78th street; that he thought the train was travelling about [illegible] an hour. This witness on cross-examination said [illegible] the deceased just about "half way between the rail and the gates;" that was the first [illegible] he saw him; that he did not know that the deceased was going to [illegible] the warning.

Testimony produced the witness of the train in question who testified that at the time of the accident he was sitting in the cab compartment for the motorman on the right hand side of the train; that he was on the lookout as his train approached 78th street; that the last stop before the accident was at the South Shore station, the last station here; [illegible] nearly a half mile from 78th street; that he motioned 78th street he reduced the speed of the train to approximately 12 miles an hour; that as he came within a distance of about 10 or 60 feet of 78th street he saw a man coming across the [illegible] the post or support of the gate; that [illegible] the train; [illegible] the whistle; [illegible] the deceased turned about [illegible] towards him; that at that time he was about 12 feet from where

the deceased was standing; that deceased seemed to move forward; that he immediately applied the emergency brake, but that a projection from the floor of the car struck deceased on the side of the head, about at the right eye, and knocked him down; that deceased fell out from the track with his feet towards the rail and his head out towards the curbing. This witness testified that it was his duty as he approached the crossing to observe whether the gates were down or not; that he observed about two blocks north of the crossing that these gates were down. He said on cross-examinatbn that he first saw deceased when about 50 or 65 feet away from him and that deceased was just straightening up after passing under the gates. He admitted that he did not mention that fact at the coroner's inquest.

Defendant also produced as a witness a Mr. Hopkins, who testified that at the time in question he was standing on the northeast corner of Exchange avenue and 75th street and was intending to go west on 75th street and cross the railroad tracks, but was delayed by the approaching train; that the train was a block away when he noticed that the crossing gates were down; that he saw deceased coming onto the railroad tracks as the train approached the crossing; that at that time he heard some sharp blasts of the whistle, looked over the crossing and saw "an elderly gentleman coming up from a raising position, coming apparently under the gate," and that "he was practically under one arm of the crossing gate in a half standing position." He further testified: "He came up facing the train and apparently became confused. I was looking at him until the train passed between him and me." He admitted on cross examination that he noticed more particularly the gates on the east side where he was, but stated that all the gates went down together.

the deceased was observing; the deceased seemed to move forward; that he immediately called the emergency brake, but that a projection from the floor of the car struck deceased in the side of the head, about at the right eye, and knocked him down; that deceased fell out from the track with his feet towards the rail and his head out towards the curbing. This witness testified that it was his duty as he approached the crossing to observe whether the gates were down or not; that he observed about two blocks north of the crossing that these gates are down. On cross-examination that he first saw deceased when about 30 or 40 feet away from him and that deceased was just straightening up after passing under the gates. He admitted that he did not mention that fact at the coroner's inquest.

Defendant also produced as a witness a Mr. Johnson, who testified that at the time in question he was standing on the northeast corner of Exchange avenue and 75th street and was intending to go west on 75th street and cross the railroad tracks, but was delayed by the approaching train; that the train was a block away when he noticed that the crossing gates were down; that he saw deceased coming onto the railroad tracks as the train approached the crossing; that at that time he heard some sharp blasts of the whistle, looked over the crossing and saw "an elderly gentleman coming up from a reclining position, coming somewhat under the gate," and that "he was practically under the arm of the crossing gate in a half standing position." He further testified: "He came up facing the train and apparently became confused. I was looking at him until the train passed between us and me." On cross-examination that he noticed more particularly the gates on the east side where he was, but stated that all the gates went down together.

Mr. Bassett, who was a conductor for the Chicago Surface Lines, testified that he was in charge of a street car moving south on Exchange avenue at 75th street at the time in question; that on this occasion he made two stops at 75th street and Exchange avenue, a 200-foot stop and a 25-foot stop; that before going over a railroad track he would make a 25-foot stop, and it was customary for the conductor to get out and go to the center of the crossing and look both ways to see if anything was coming; that when his car came up to the crossing at that time the gates were down and he therefore did not go out but waited until the gates were raised. He says he saw the train approaching when it was a block or so away and that "the gates were down before we got there," and "were all down on the west side." The witness further said that he was standing there waiting for the gates to go up or for the train to cross, and that while he was there he saw "a fellow walk across the road, from the west side of Exchange avenue towards the railroad, and as he got to the gate he turned around and looked before he ducked under the gates, and just as he ducked under the gate the train had come across the crossing." He says that he saw this man get up and look around and start right at the train, which was at that time already at the crossing; that he did not see the train strike the man because a pillar that supported the gates blocked his view; that he had no occasion to make any report to the street car company; and that he had nearly forgotten the matter until he talked it over with the investigator for defendant.

Mr. Shoemaker, a street car motorman, testified that he was standing at the southwest corner of 75th street and Exchange avenue when he heard two loud, sharp blasts of the train whistle; that he saw the motorman on the approaching train lean forward and look down and apply the air; that at that time the deceased was straightening up under the gates and was hit; that he had no oc-

casion to notice the gates before that time; that he did not see deceased struck.

Emil Beck testified that at the time in question he was on the front end of a street car standing on Exchange avenue at 75th street; that he was the motorman on the car; that when he stopped at the crossing the gates were lowered; that he stood there a short time before the accident occurred; that he saw the deceased before he went on the railroad tracks; that deceased crawled under the crossing gates; that he made a report of the accident the day following to the Surface lines for which he worked.

James Webb, who was the towerman at the time and place in question, testified that he was in the tower at that time; that he got the usual buzz indicating the approach of the train on that evening; that when he got it he rang the bell to warn travelers that he was going to let the gates down and that he let the gates down; that the gates worked by air and that to let all the gates down he had to turn six levers which took "just half a second;" that it was daylight and when he let the gates down he could see the train was between 73rd and 74th streets; that he heard the train sound a whistle, but that he did not see the deceased. On cross examination he said he knew where the train was that day because he was looking at it; that when he got the buzz he looked around to see who was there, then rang the bell and put the gates down.

Willard J. Mack, who had news-stands at the intersection, testified that he was on the southeast corner of the intersection when something happened at a stand he owned on 71st street; that he crossed the tracks when both gates were down to get his car which he was going to drive to 71st street; that his car was parked on the southwest corner, on the Saginaw avenue side; that as he crossed the tracks he looked to see how close the train was;

[illegible] to [illegible] [illegible] [illegible]

that he heard the shrill whistle of the train, looked around and saw the body of the deceased lying on the curbing of the street. He says he did not see the deceased before he was struck but that the gates were down before the witness left the east side of the tracks.

Clifford Larson, 17 years old, testified that he witnessed the accident; that he was standing on the sidewalk on the west side of Exchange avenue between Saginaw avenue and 75th street; that he saw Mr. Meyerhoff just before he went to the other side of the gate; that he noticed him g ing around the gate and about two minutes later he saw the train that struck him; that Meyerhoff was on the west side of the gate when the witness first saw him, and that all the gates were then down; that the witness had been walking east but was waiting for the train to go across, and that Anthony Hanrahan was with him at that time. The witness was on his way to an A. & P. store where he was employed.

Anthony Hanrahan testified that he saw the accident; that he was standing in the center of the street almost directly behind the deceased at the time; that he saw the deceased when the horn of the train was sounded; that the deceased was then on the east side of the gates; that the gates were down and the train coming, and that was what caused him to stop on Exchange avenue. He says, "We just came up to the corner and the gates were down."

Mr. Hinkle, the signal maintenance foreman for the defendant, testified in detail as to the method of signalling towermen who operate crossing gates, stating that a track appliance was connected directly to the rails which fed the current; that at any point desired the rails were split and the appliance installed making an individual circuit over the two rails; that the approach of the train on these rails at a given point would cause a short circuit across the two rails which, in turn, discontinued the current

that he heard the small vehicle [illegible] saw the body of the [illegible] on the [illegible] he says he did not see the [illegible] that the [illegible] of the track.

Clifford [illegible], 17 years old, [illegible] witnessed the accident; that he was [illegible] the right side of the road [illegible] stated; that he saw [illegible] other side of the [illegible] and about two minutes [illegible] saw the train [illegible] everybody was on the [illegible] saw him, and [illegible] had been walking east but was waiting for the train to [illegible] and that Anthony [illegible] was on his way [illegible] was [illegible] employer.

Anthony [illegible] that he did not see the accident; that he was driving [illegible] behind the deceased in the street; that he was [illegible] born of the train was sounded; that the deceased was [illegible] east side of the track [illegible] the train [illegible] coming, and that was [illegible] to stop on account of approaching vehicles. He says, "He just [illegible] the center of the [illegible] were down."

Mr. [illegible] testified in behalf of the defendant, testifying [illegible] the [illegible] lowermen who [illegible] was connected [illegible] any point [illegible] making an individual circuit over the [illegible] of the train [illegible] circuit motors [illegible]

in these rails; that this dropped a relay which was controlled by the current of the rails at another given point; that this relay fed the battery by wire to a bell in any particular tower which was caused to ring when the relay dropped or as the relay dropped it closed the circuit on the bottom and furnished current to that bell to ring. He says that such a device was in use at the time between the South Shore station and 75th street tower; that after a southbound train left the South Shore station the buzzer began to ring approximately 400 feet south of East 72nd street, which was about 2000 feet from the 75th street grade crossing. On cross examination he stated that these buzzers were about 99 per cent perfect on the Illinois Central and very seldom got out of order.

In rebuttal Mrs. Jennie Simon, who occupied a grocery and market at the corner of 75th and Exchange, stated that she was in the store the night of the accident and was standing in front of the store; that she saw a street car approaching at the time of the accident, and that just as the street car approached the crossing the train came along.

Defendant contends that under this evidence the court erred in refusing to direct a verdict in its favor and cites Greenwald v. B. & O. R. R. Co., 332 Ill. 627; C. & A. R. R. Co. v. Lewandowski, 190 Ill. 301, and many other cases so holding. In view of the conflict in the evidence, however, as to whether the gates were down at the time the deceased started to cross the tracks, we think it must be held that the questions of the negligence of defendant and the contriburoty negligence, if any, of deceased were for the jury. Of the many cases cited from this jurisdiction we refer to only two - C. & E. I. R. R. Co. v. Schmitz, 211 Ill. 446, and Rosenthal v. C. & A. R. R. Co., 255 Ill. 552.

in some relay; that had [illegible] a [illegible] the court [illegible] by the movement of the relay to [illegible] the [illegible]; [illegible] the battery by wire to [illegible] cause, be [illegible] closed the circuit [illegible] intended [illegible] to ring. He says that [illegible] was in use on a line between the South Shore station and [illegible] bound train left the [illegible] approximately [illegible] 2000 feet from the [illegible] He stated that there are [illegible] Illinois Central [illegible].

In rebuttal Mrs. Doris Lion, [illegible] a grocery and market at the corner of [illegible] and [illegible] in the store the [illegible] the store; that she saw a [illegible] accident, and that just as the street car approached the crossing the train came along.

Defendant contends that [illegible] the court erred in refusing to direct a verdict in its favor and cites Greenwald v. [illegible], [illegible] Ill. App. [illegible] Lewandowski, 191 Ill. App. [illegible] In view of the conflict in the evidence, however, [illegible] were issue as to the time the defendant [illegible] the crossing, we think it must be held [illegible] the weight and [illegible] for the jury. [illegible] and Consolidated [illegible], [illegible] 2d, and Lorenzini v. [illegible], [illegible] 2d. 3[illegible].

While we think the case was properly submitted to the jury, the evidence we have recited discloses that the verdict of the jury is clearly and manifestly against the preponderance of the evidence, and we hold that the trial court should have granted the motion for a new trial for that reason. The somewhat uncertain evidence given by one eye-witness produced by plaintiff to the effect that the gates were not down cannot prevail against the evidence of nine witnesses, many of them entirely disinterested, who testified to the contrary, together with the evidence as to the usual manner in which the gates were operated, which tends to corroborate these witnesses on all essential facts. This was a most unfortunate accident, but a clear preponderance of the evidence as to the number of witnesses and also as to the corroborating circumstances and the probability of the facts which they severally relate, indicates that the gates were closed in the usual manner before the deceased entered upon the tracks where he received his injury. It was the duty of a trial judge under such circumstances to grant the motion of defendant for a new trial. (Belden v. Innis, 84 Ill. 78; Cady v. G. T. W. Ry. Co., 251 Ill. App. 513.)

For the reasons indicated the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

[illegible] the
jury, the evidence we must insert a [illegible] the
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to the number of witnesses [illegible] [illegible]
[illegible] of the [illegible] [illegible]
[illegible], indicate that [illegible] [illegible]
[illegible] the [illegible] [illegible]
injury. It was the duty of a [illegible] [illegible]
to grant the motion of defendant [illegible] [illegible].
54 Ill. 79; [illegible] [illegible].

For the reasons [illegible] the judgment is reversed and
the cause remanded for [illegible].

REVERSED AND REMANDED.

O'Connor, P. J., [illegible] concurred, [illegible].

35,233.
35233

PETER C. BACKER,
Appellee,
vs.
STANDARD CLUB, INC., a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

263 I.A. 638

MR. JUSTICE MARCHETT DELIVERED THE OPINION OF THE COURT.

In an action on the case for personal injuries and on trial by jury a verdict for plaintiff was returned in the sum of $5500., upon which the court, overruling motions for a new trial and in arrest, entered judgment, which defendant asks us to reverse.

The declaration charged that defendant owned, managed and controlled a building at or near Jackson boulevard and Plymouth court in the city of Chicago in which was an elevator used for transferring freight from the basement or sub-basement to the main floor; that plaintiff was collecting garbage at the Club and used the elevator at the request and at the direction of defendant to raise garbage and rubbish to the main floor where he was to carry it away that he was in the exercise of care, but that defendant failed in its duty, in that it furnished an elevator that was loose, jerky and unlighted and permitted a sill or ceiling of the sub-basement to project into the elevator shaft whereby plaintiff's foot was caught in the sill and was crushed and permanently injured.

There was a motion of defendant for an instructed verdict at the close of plaintiff's evidence, and this motion was renewed at the close of all the evidence. Both motions were denied.

Defendant contends that the peremptory instruction should have been given and that on the uncontradicted evidence plaintiff was not entitled to recover. It is also argued that the court erred in excluding evidence offered by defendant.

It is urged in the first place that plaintiff was upon the premises as a mere licensee, and that therefore defendant owed him no duty as to care. Gibson v. Leonard, 143 Ill. 182; Bentley v. Lovercck, 102 Ill. App. 166, and in Crane Co. v. Sobkowicz, 131 Ill. App. 211, are cited and relied on. The evidence shows that plaintiff had been doing business with defendant from twelve to fifteen years and in this particular kind of work for four or five years. He had an oral contract for services by the month under which he was obligated to haul garbage for a compensation of $65. per month. He also hauled garbage for other concerns and usually earned from $250. to $300. per month. He testified that defendant furnished an elevator to lift the garbage and that he was authorized to use the elevator. As the contract was for the mutual interest of both parties, we think the jury could reasonably find that plaintiff was upon the premises by invitation and of right and that defendant owed him the duty of ordinary care (Kennedy v. Helsen, 182 Ill. App. 200; Mallory v. Day Carpet & Rug Co., 245 Ill. App. 465; Furtell v. Phila. Coal Co., 256 Ill. 114; Milouskis v. Terminal Ry. Co., 256 Ill. 547).

The question of whether plaintiff was free from contributory negligence is a different question, and the evidence bearing thereon is practically uncontradicted. The elevator used was a freight elevator of the hydraulic type with a plunger on the bottom of the platform extending down into a socket or groove in the ground. The platform of the elevator was about five feet square. The north and south sides of the elevator were enclosed with metal or steel sides about five feet high. On the east side

the elevator opened against a concrete wall and on the west side it opened onto the floors of the sub-basement and basement. The wall on the east side was rough and in some places stuck out a quarter of an inch. When the elevator was moved up and down it would hit a rough spot and move a little from side to side. The space between the elevator and the shaft was about a quarter of an inch on each side. The elevator was operated up and down the shaft on what were called "shoes," which were at the side and did not allow a "play" of over a quarter of an inch. The condition of the elevator at the time of the accident on November 23,1927, was the same as it had been prior to that time. When plaintiff recovered from his injuries he resumed his work under the contract with defendant and at the time of the trial was taking out ashes and garbage from the same building and was using the elevator in substantially the same condition as it was before he was injured.

At the time of his injuries plaintiff was engaged in removing the rubbish and garbage and was assisted by his employee, one Thomas. They loaded four cans with ashes and rubbish in the sub-basement. They placed these cans on the elevator, and on the top of one of the cans they, or one of them, placed one or two metal hoops. Plaintiff then stood on the elevator at the northwest corner of it, the four cans taking practically all the space on the platform. Plaintiff pulled a cable, and the elevator moved upwards and, as he says, shook and jerked as was usual. He says that the jerking and shaking caused the hoop to fall off the can and on to his foot. The hoop came between his lower limbs, and as he twisted his left foot, the foot was caught between the ceiling of the first floor and the elevator platform. The injury was severe and, the evidence tends to show, permanent. While there was no electric light in the elevator, there was an electric lighted lamp on the ceiling of the sub-basement six feet from the opening, and

this light threw its rays to the door of the elevator. There were also several electric lighted lamps on the ceiling of the basement floor near the elevator shaft, and above that point, the metal circular top over the elevator itself forces open the doors at the sidewalk level causing daylight to come into the shaft. There was no evidence tending to show the accident happened on account of insufficient light.

Can it be said upon these uncontradicted facts that defendant was guilty of negligence and that plaintiff was free from contributory negligence? Plaintiff was thoroughly familiar with the construction of the elevator and of the shaft in which it ran, and he himself adopted the mode of its operation. The declaration does not allege that there was any negligence in the manner in which the elevator was constructed, and if it so alleged there is no proof in the record tending to sustain any such allegation. There is no proof tending to show that the fact that the sill extended about a quarter of an inch into the elevator shaft indicated any negligence by defendant or, indeed, that this was the actual cause of the injury which plaintiff received. He and his employee under his direction loaded the elevator. He, himself, operated the elevator as loaded, and the injury which he received, the uncontradicted evidence shows, was due to the fact that after filling the platform of the elevator to its capacity, he and his employee proceeded to put the hoop or hoops on top of the garbage cans. One of them put the hoops there and loaded the elevator with the cans with full knowledge from long and personal experience that the elevator while in course of movement would be loose and jerky. The falling of the hoop and plaintiff's own cramped position when it fell were the proximate causes of the injury which he received, and for both of these, plaintiff, not defendant, was responsible. Under the circumstances, as a matter of fact and of

law, plaintiff must be held guilty of contributory negligence, proximately tending to cause the injury for which he sues, and for that reason the court should have directed a verdict as requested by defendant. For the error indicated, the judgment will be reversed with a finding of facts and judgment here in favor of defendant. Beidler vs. Brumbaw, 200 Ill. 425; Illinois Central R. R. Co. vs. Oswald, 208 Ill. 270.

REVERSED WITH FINDING OF FACTS AND JUDGMENT HERE.

O'CONNOR, P.J., and McSURELY, J., concur.

FINDING OF FACTS

We find as a matter of fact and of law that on the uncontradicted evidence the plaintiff in this case is guilty of contributory negligence proximately tending to cause the injuries for which he sues, and that as a matter of law he is not entitled to recover.

35286

NATIONAL BANK OF THE REPUBLIC OF CHICAGO,)
Appellee,)
vs.) APPEAL FROM MUNICIPAL COURT OF CHICAGO.
JOHN R. O'ARY,)
Appellant.) 265 I.A. 638

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on contract and upon trial by jury, at the close of all the evidence the court at the request of plaintiff instructed the jury to return a verdict against defendant and in favor of plaintiff for the sum of $1,200. The verdict was returned and judgment entered thereon, to reverse which this appeal is prosecuted.

Plaintiff's claim is based upon a demand for commissions in a real estate transaction alleged to be due from defendant to one Clara E. Howard, a duly licensed real estate broker in the city of Chicago. The statement averred that the commissions had been duly assigned by Mrs. Howard to plaintiff. The right to bring such action in plaintiff's name is based on Section 18 of the Practice Act (see Cahill's Statutes, chap. 110, Sec. 18).

The alleged reasons for reversal are of a quite technical nature. It is contended that the statement of claim does not set forth a good cause of action because the verification of it is made by one of the attorneys for plaintiff, and Fingado v. Wilson Braiding & Embroidery Co., 205 Ill. App. 267, is cited to that point. The cases are clearly distinguishable, in that the plaintiff here is a corporation and the verification is by Julius N. Heldman, who says that "he is the duly authorized agent" of

plaintiff. It is quite difficult to see how a corporation could act except through its agent and how the further fact that the agent happened also to be an attorney for plaintiff would be material. The rule stated in the Fingado case has been questioned in Gallagher v. Schmidt, 231 Ill. App. 168, and in Winnitt v. Kornblith, 248 Ill. App. 108. (See also Green v. Ashland Sixty-Third State Bank, 259 Ill. App. 662). Whether the construction of the statute is to be strict or liberal (a question which has not yet been decided by the Supreme Court) we think it may not be held that the rule announced in Fingado v. Wilson etc. Co. is applicable where a corporation is plaintiff.

Defendant also contends that the statement of claim is deficient in that the date of the assignment is laid under a videlicet. An examination of the affidavit, however, discloses that the affidavit does not so state the date of the assignment. On the contrary, the averment is positive that the same was made on January 3, 1920. Upon trial this was amended by striking out the figure "3" and inserting the figure "7." The amendment was made on the face of the pleading, to which we see no objection.

It is also urged that the statement of claim does not set forth how and when plaintiff acquired title, and MacFadyean v. Watting Mfg. Co., 244 Ill. App. 224, is cited. Here, again, an examination of the statement of claim shows that these matters are in fact set forth.

Mrs. Howard's claim was based upon the following instrument

"Chicago, December 22nd, 1925.

C. E. Howard & R. R. Thorne,

With reference to proposed exchange of corner 95rd & Baltimore Avenue with Mr. J. R. Selman, in the event that contract is signed and exchange is consummated by delivery of

plaintiff. [illegible]

act except [illegible]

agent [illegible]

material [illegible]

In Dalimore v. [illegible], [illegible]

Kornblith, [illegible]

Third State Bank, [illegible]

the statute [illegible]

yet been [illegible]

that the [illegible]

make a corporate [illegible]

[illegible]

In contrast [illegible]

a violation, an [illegible]

that the affidavit [illegible]

of the motion. [illegible]

on January [illegible]

the tips [illegible]

on the face [illegible]

[illegible]

not set forth [illegible]

v. Building [illegible]

examination [illegible]

was in [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

deeds, I agree to pay you for your services as broker the sum of Twelve Hundred Dollars. If deal is not consummated by delivery of deeds no commission is to be charged.

(signed) John R. Geary.

The above is correct.
(signed) C. E. Howard B. N. T.
(signed) R. B. Thorne."

It is said that the statement of claim is insufficient under Section 18 because it does not set forth how and when C. E. Howard secured title to R. B. Thorne's interest in this instrument in writing. Upon the trial Mr. Thorne was called as a witness and testified that he was at the time in question a real estate salesman employed by Mrs. Howard and that before the commencement of the suit he had transferred to her any claim which he might have to any portion of the commission. Such action would be sufficient to vest the title in her. (Hyatt v. Fowler, 135 Ill.App. 428). Moreover, since the relationship of Thorne to Mrs. Howard was that of an employee to his employer, she would have a right to sue in her own name for the value of his services, irrespective of Section 18 of the Practice Act. In fact, he would have no real title or interest in and to the claim. Again, Section 18 does not require that plaintiff should set forth how Mrs. Howard acquired any title which Thorne might have but rather how plaintiff acquired Mrs. Howard's title. For the same reasons, the contention of defendant that there is a variance between the pleadings and the proofs is without merit.

The contract for exchange of property, on which plaintiff bases its claim, was not voluntarily carried out by defendant Geary. On the contrary, he attempted to abandon and rescind it. Salman, the other party, brought a bill for specific performance in the Superior court of Cook county. A decree was entered dismissing the bill, but upon appeal to the Supreme Court this decree was reversed and the cause remanded with directions

to the Superior court to enter a decree as prayed. (Selman v. Geary, 334 Ill. 642). As a result of this prolonged litigation, four years elapsed between the execution of the contract and the entry of the decree for its specific performance. There were encumbrances upon the property which had in the meantime been provided for, and the decree as finally entered recognized the equities arising from these changed conditions. Defendant now contends, on the authority of Close v. Keene, 250 Ill. 228, that the transaction as finally carried out is different from that contemplated in the agreement to pay commissions, and that defendant is not obligated to pay the same for that reason. However, there is no material change in the essential terms of the contract, and the transaction as carried out under the decree of the court was based upon the same and conforms substantially therewith. By a wrongful refusal to perform, out of which equities recognized in the final decree arose, defendant could not deprive the owner of his right to commissions.

It is also urged that the court erred in excluding evidence tending to show that defendant rightfully refused to perform the contract. In view of the fact that the transaction was finally consummated and deeds exchanged, the evidence was properly excluded as immaterial.

The judgment will be affirmed.

AFFIRMED.

O'CONNOR, P. J. specially concurring: I think the holding in Fingado v. Wilson Braiding & Embroidery Co., 205 Ill. App. 207, is wrong.

McCURDY, J., also concurring.

34364

MAX D. WILSON,

Appellant,

v.

THOMAS H. KELLEY and BYRD B. KELLEY,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

263 I.A. 638

Opinion filed October 21, 1931

MR. PRESIDING JUSTICE HEBEL delivered the opinion of the court.

This is a suit in chancery to establish the existence of a partnership between the complainant Max D. Wilson and the defendants Thomas H. Kelley and Byrd B. Kelley, and to dissolve the partnership, and for an accounting. The chancellor after a hearing dismissed the bill for want of equity, from which decree the complainant appeals.

It is contended by the complainant that the decree of the court is contrary to the weight of the evidence, and this is the only question now before the court. Therefore, we will apply the rule that where a chancellor, as in this case, sees and hears the witnesses, determines their credibility and the weight of the evidence, a reviewing court will not disturb his findings unless the decree is against the manifest weight of the evidence; and if it is, will not hesitate to reverse the decree if the weight of the evidence is such that the reviewing court can say the chancellor palpably decided the case contrary to the evidence.

In disposing of this case it will not be necessary to pass upon the pleadings, for the reason that no question is raised as to their sufficiency.

The record discloses that the complainant and the defendant Thomas H. Kelley are physicians and surgeons by profession, and have practiced this profession in the City of Chicago.

Opinion filed October 21, 1931

of the court.

the court is contrary to the weight of the evidence, and there is the
only question for review the court. [illegible] will assert the
rule that where a chancellor, with the [illegible]
witnesses, determines their credibility [illegible]
evidence, a reviewing court will not [illegible]
the decree is without the manifest [illegible]
it is, will not be it is [illegible]
the evidence is [illegible]
[illegible]

While the record is voluminous, the facts are, substantially, that the complainant was graduated from Loyola University in 1912, and that one of his professors was Dr. Kelley, with whom he was very friendly; that after complainant was graduated he opened an office on 31st street, and this friendship between the doctors continued; that he remained in the locality until 1917, when Dr. Kelley suggested to him that he move to Dr. Kelley's new building located at 818 East 75th Street, upon terms satisfactory to both parties; that the complainant did move to this locality and stayed until a new arrangement between them was made.

The question arises whether this arrangement, at the time it was entered into between the two doctors, was that of a partnership or a contract of employmemt. The complainant says that it was a partnership, on these terms, which were not reduced to writing; The building occupied by the doctors was owned by Mrs. Byrd Kelley, the wife of Dr. Kelley, and was to be used as a clinic, known as "The Kelley Clinic," but that it was to be operated by the partnership. Dr. Kelley was to have the majority control, with a 52 per cent interest, and Mrs. Kelley was to have a 24 per cent interest for the use of the building contributed by her, and the complainant was to have 24 per cent - about one-fourth interest in the whole project. Dr. Kelley, under this arrangement was to be the managing head; and, in order to finance the scheme, it was agreed that each should draw out of the funds of the clinic only what he needed for his living expenses. The complainant, who was unmarried at that time, was to draw out $200 a month, and Dr. Kelley was to receive $600 a month, to support himself and his family, consisting of his wife and two children. Dr. Kelley's version of this new arrangement is that towards the end of the year 1918, the complainant's practice began to dwindle, and he, Dr. Kelley, thought it would be better if

he could feel free to call upon the complainant, and so proposed a salary of $300 a month; that, on January 1, 1919, under this arrangement, the complainant agreed to devote his entire time to the undertaking, and drew this amount each month until he was married in 1923, when he drew $300 a month.

There is a conflict in the evidence as to the withdrawal by the complainant of funds for the purchase of a new automobile. Whether this sum was paid to the complainant by Dr. Kelley on account of a previous loan, or was withdrawn from the complainant's account, the record is not clear. The evidence does disclose that five witnesses testified, substantially, that after January 1, 1919, Dr. Kelley told each of them that the complainant was his partner. This, however, Dr. Kelley explains by saying that he did occasionally introduce a doctor, practicing in the clinic, as a partner. The complainant drew funds at the rate of $200 and $300 a month after marriage, but the yearly totals of these monthly withdrawals are not exact, as shown by the record, but in the main they amount to the yearly totals of $2400 when the monthly withdrawal was $200.00, and $3600 when the monthly withdrawal was $300.00. Books of account were kept, to which the complainant had access, and in which, during certain years, the withdrawals by him were entered as salary. It also appears that for a period of four months Dr. Kelley's withdrawals were likewise entered in the clinic books as salary. During the time that the complainant was connected with the clinic it prospered and considerable money was made each year, and it appears from the books that Dr. Kelley withdrew large sums each year from the clinic for his personal use, and also for investment in real estate. The real estate transactions were kept in a separate set of books by Dr. Kelley. However, the clinic books contain some of the real estate transactions, which involved large sums of money.

He could [illegible] to [illegible] the [illegible] of [illegible] a salary of [illegible] a month; this, on [illegible], [illegible], where [illegible] arrangements, the [illegible] appeared [illegible] the underclothing, and [illegible] married in 1885, [illegible].

There is a conflict in the [illegible] drawn by the complainant [illegible] made for [illegible] mobile. Neither this nor the [illegible] on account of [illegible] account, the record is not clear. The evidence does [illegible] tive witnesses [illegible] Dr. Mahaffy said [illegible] Yale, however, Dr. Mahaffy [illegible] introduced - looked, practicing in the [illegible] complainant [illegible] marriage, but the [illegible] not exact, as shown by the [illegible] the yearly total of [illegible] and $5000 when the monthly [illegible] were kept, to which the [illegible] certain years, the [illegible] also [illegible] drawing with [illegible] the time to [illegible] prosecuted and [illegible] from the [illegible] the claim for [illegible] [illegible] house by [illegible] real estate transactions, [illegible] [illegible] of money.

The evidence does not show that Mrs. Byrd B. Kelley, defendant, was present at the time or took any part in the conversations had between the doctors regarding any arrangement entered into by them. This is unusual, for if the contention of the complainant is true, by this arrangement she, for clinical purposes, was to contribute the use of the building owned by her. The record does not show that she was consulted about the use of the building.

Another unusual circumstance in this case is that the complainant had access to the books of the clinic and the annual audit prepared for the clinic, beginning with the years 1921-1922; and had talked with Dr. Kelley about the audits and had knowledge of the withdrawal of funds by Dr. Kelley, which was inconsistent with the partnership arrangement and in violation of the terms of the agreement testified to by the complainant.

The complainant also talked with Dr. Kelley about the latter's withdrawal the first year of $28,000 from the funds of the clinic. He said that he did not know the amount of the withdrawal by Dr. Kelley the second year, but that if the books show that $36,000 was withdrawn "why evidently I knew what it was from time to time." He also said, "If the books show that he (Kelley) withdrew $40,456.54 the third year, why I knew that at the time," and that the same was true "if the books show that Dr. Kelley withdrew $35,794 the fourth year; " that "Until the latter part of the time that I was there I was familiar throughout the years with all the withdrawals that Dr. Kelley was making from the clinic funds," and that he knew Dr. Kelley was paying out of the clinic funds such bills as Marshall Field & Co., household bills, Mandel Bros. Bills, M. L. Rothschild's and the bills of other downtown stores. He testified that Dr. Kelley was probably paying the rent for his apartment out of the funds, the wages of the maid in Dr. Kelley's home, the Peterson market, and other grocery and market houses for household

The evidence does not show that [illegible], defendant, was present at the time or took any part in the conversations between the doctors regarding any arrangement entered into by them. This is unusual, and if the allegation of the complainant is true, by this arrangement she, for financial reasons, was to contribute the use of her building [illegible]. The evidence does not show that she was consulted about the use of her building.

Another unusual circumstance in this case is that the complainant had access to the books of the clinic and the annual audits prepared for the clinic, [illegible] years 1921-1923; and had talked with Dr. Kelley about the profits and had knowledge of the withdrawal of funds by Dr. Kelley, which is inconsistent with the partnership agreement [illegible] of the terms of the agreement testified to by the complainant.

The complainant also testified that Dr. Kelley [illegible] latter's withdrawal the first year of 1921, [illegible] funds of the clinic. He said that he did not know the amounts of the drawings by Dr. Kelley the second year, but that [illegible] $20,0[illegible] was withdrawn "very critically I know [illegible] to time." He also said, "If the money [illegible] (Kelley) withdrew $45,588.54 the third year, why I [illegible] and that the same was true "If [illegible] the fourth year; [illegible] was there I was familiar with [illegible] drawals [illegible] Dr. Kelley [illegible] he knew Dr. Kelley [illegible] as [illegible] Co., [illegible] Kelley's and [illegible] that Dr. Kelley [illegible] of the funds, the wages [illegible] paid in Dr. Kelley's name, the Peterson market, and other property [illegible]

supplies, Dr. Kelley's life insurance premiums and his garage bill; and that he was buying and maintaining his automobile out of such funds.

It may be noted from a charge on the books that a deduction was made from complainant's salary checks for money borrowed from the clinic, retained from the clinic fees, or money which he owed the clinic for dental work.

The fact that the defendant Dr. Kelley withdrew large sums of money from the clinic fund would indicate that the books throughout the years from 1919 to September 30, 1926, were kept upon an individual ownership basis and not as a partnership.

During these years, the complainant made no serious complaint and took no steps until sometime before the bill of complaint was filed, and after he had retired from the clinic.

We quite agree with the contention of the complainant that the evidence of the statement by Dr. Kelley that the complainant was his partner, was of probative force; still this is not conclusive, and if the evidence, taken as a whole, does not indicate that the conclusion of the chancellor is against the weight of the evidence, we will not use our judgment to determine whether upon these facts we might reach a different conclusion. This was the duty of the chancellor, who was in a better position than this court to observe the witnesses and determine their credibility; to weigh the facts, and to exercise the judgment of a chancellor, controlled, of course, by the facts and the law governing the litigation between the parties.

From an examination of this record, we are unable to find that the decree entered in this case is against the manifest weight of the evidence; and the decree is, accordingly, affirmed.

DECREE AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

34695

BIRMINGHAM & PROSSER CO.,
Defendant in Error,

v.

G. W. SMITH,
Plaintiff in Error.

ERROR TO

CIRCUIT COURT

COOK COUNTY.

263 I.A. 638

Opinion filed October 21, 1931

MR. PRESIDING JUSTICE HEBEL delivered the opinion of the court.

This is an action in assumpsit, and when reached for trial was submitted to the trial court, without a jury. After hearing the evidence the court found the issues for the plaintiff (defendant in error), and assessed the plaintiff's damages in the sum of $3169.00, and entered judgment against the defendant (plaintiff in error) for this sum.

The declaration consists of two counts, to which the defendant filed six pleas; and in reply, the plaintiff filed a replication to each plea.

The basis of the action was two promissory notes, executed by Telefo Desk Pad Company; one for $2400, and one for $1600, both dated January 18, 1927. One of said notes was due on March 18, and one on April 18, 1927, and each of the notes was endorsed by the defendant.

Two points are made by the defendant, one of which is that the replication of plaintiff averred that the notes were presented for payment and protested for non-payment, of which the defendant did not have notice; and the other point is to the effect that the plaintiff received a check for $316.46, in settlement, which was accepted under the terms offered; and further, that the check was certified by the act of plaintiff, and therefore was

in full payment of the notes. It is to be noted that in the brief filed by the defendant this admission is made:

> "It is to be regretted that certain matters which occurred in the trial are not reviewable as preserved in the record. Counsel for defendant is aware that the ruling of the trial Judge as to the legal effect of certification of a check was not preserved by a proposition of law. As the evidence was not transcribed verbatim, decision as to the weight of evidence will be difficult, but we submit enough will appear to show the weight of evidence was with defendant. On the question of variance there can be no doubt."

In view of this statement, the court is confronted with the rule that in the absence of a bill of exceptions purporting to preserve all the evidence, this court must presume that the judgment was justified by the evidence presented to the trial court.

In the case of Lagow, et al v. Robeson, 167 Ill. 615, the court, in passing upon a question similar to the one in the instant case, said, in substance, that one desiring to review the judgment of the lower court in dismissing his action on motion, must preserve the evidence heard thereon by a bill of exceptions, which must purport to contain all the evidence, otherwise it will be presumed the lower court heard evidence sufficient to justify its judgment.

In the following cases the same rule was applied in the matters before the court:

Lagow, et al v. Robeson, 167 Ill. 615,
James v. Dexter, et al, 113 Ill. 654,
Peshtigo Co. v. Merchants & Shippers Agency, 83 Ill. App. 149
Metzger v. Morley, 99 Ill. App. 280
Leavitt v. Bolton, 102 Ill. App. 582.

We have examined the record before us, and are of the opinion that the questions raised cannot be considered, for the reason that the bill of exceptions does not set forth all the evidence presented to the trial court, and the presumption necessarily follows that the judgment was justified by the evidence presented to the trial court. The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

in full appear of the notes. It is to a motion that is the instant filed by the defendant this division is as let:

> "It is to be restated in a certain motion [illegible] declared in the trial are not reviewable as preserved in the record. Counsel for defendant is urging the trial court to [illegible] judge as to the legal sufficiency of evidence, which was not preserved in a particular manner. In the evidence was not transcribed verbatim, motion [illegible] to the weight of evidence will be difficult, but we [illegible] will [illegible] to show the weight of evidence [illegible] defendant. On the question of verdicts [illegible] no doubt."

In view of this statement, the court is confronted with the rule that in the absence of a bill of exceptions, purporting to preserve all the evidence, this court will presume that the judgment is a justified by the evidence presented to the trial court.

In the case of Lemon, et al v. Johnson, 129 Ill. App. 2d, the court, in reading upon a motion similar to the one in the instant case, said, in substance, that we decline to review the judgment of the lower court in disregarding the motion on motion, that preserve the evidence based thereon by a bill of exceptions, which must purport to contain all the evidence, otherwise it will be presumed the lower court heard evidence sufficient to justify its judgment.

In the following cases the same rule was applied in the matters before the court:

> Lemon, et al v. Johnson, 129 Ill. App. 2d.
> Jones v. Baxter, et al, 111 Ill. App.
> Leadbigo Co. v. Morphens & Schwarz Company, 96 Ill. App. 149
> Bethger v. Morley, 90 Ill. App.
> Leavitt v. Sotton, 10 Ill. App. 2d.

We have examined the record before us, and are of the opinion that the questions raised cannot be considered, for the reason that the bill of exceptions does not set forth all the evidence presented to the trial court, and the presumption necessarily follows that the judgment is justified by the evidence presented to the trial court. The judgment is accordingly affirmed.

AFFIRMED.

KILKUS AND [illegible], JJ., concur.

34737

HENRY FRERK SONS, a Corporation,
Appellee,
v.
F. W. BIERHANZEL and J. BIERHANZEL,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

263 I.A. 639

Opinion filed October 21, 1931

MR. PRESIDING JUSTICE ABBEL delivered the opinion of the court.

This is an appeal by the defendants from an order entered in the Municipal Court of Chicago denying the prayer of the petition of the defendants to set aside and vacate the judgment entered by default in the sum of $3,863.79 in favor of the plaintiff.

On December 19, 1929, a judgment by confession was entered in the Municipal Court of Chicago in favor of the plaintiff and against the defendants for the sum heretofore stated. This judgment was entered on a judgment note dated January 1, 1926, payable to Henry Frerk Sons, in the sum of $10,000 and signed by the defendants, F. W. Bierhanzel and J. Bierhanzel.

On February 5, 1930, the defendants made a motion to vacate said judgment by confession. Thereafter, on February 26, 1930, the prayer of the petition of the defendants to vacate said judgment by confession was granted, and said petition was allowed to stand as the affidavit of merits, and the judgment vacated to that extent and ordered to stand as security. On April 11, 1930, a judgment by default was entered in favor of the plaintiff in the sum of $3,863.79. Thereafter, on June 13, 1930, under the terms of Section 21 of the Municipal Court Act, the defendants made a motion to vacate and set aside the judgment entered by default on April 11, 1930, supported by a petition and affidavit. A hearing was had before the court on July 1, 1930, at which the defendants were given leave to

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file an amended petition instanter, and the case was heard upon said amended petition and affidavit of the defendants. No other evidence was presented to the court by the parties to this litigation.

It appears from the amended petition of the defendants that the judgment in this case was rendered on a note in the sum of $10,000; that on March 1, 1924, the defendants were indebted to the plaintiff in a sum in excess of $12,000, and at that time a note in the principal sum of $10,000, dated March 1, 1924, payable in 90 days, was executed and delivered by the defendants to the plaintiff; that defendants were thereupon credited with $10,000 on said account; that said note was renewed, on several occasions, by the execution and delivery of new notes by the defendants to the plaintiff, and the note sued on in this case is the last note signed and delivered by the defendants to the plaintiff in renewal of the original note of March 1, 1924; that when the note sued on became due, the defendants could not pay it; that W. A. Ball and Otto Frerk, officers of the plaintiff corporation, suggested that the defendants execute a third mortgage securing the payment of a note in the sum of $12,500 on said premises owned by the defendants; that the amount of $12,500 was to cover the $10,000 note of January 1, 1926, interest thereon and the commission for making the mortgage; that the defendants did execute and deliver such a note and mortgage to the plaintiff; that said Otto Frerk was made a trustee in said third mortgage, and that said mortgage and note evidencing the indebtedness of $12,500 were accepted and received by said corporation in full payment of the $10,000 note; and that the plaintiff corporation had failed and refused to deliver the note which was cancelled by agreement of the parties.

It further appears from the amended petition that after said judgment by confession had been vacated and set aside, the cause was placed upon the trial calendar and set for trial in the Municipal Court on March 13, 1930; that by agreement of the

[illegible]

parties the cause was continued to May 28, 1930; that a memorandum of the date on which the case was to be tried was made by the secretary of the attorney for the defendants; and that when the attorney appeared on May 28, 1930 to answer the call of the case, it did not appear on the trial call.

It also appears from the petition that the case was called for trial on March 28, 1930, and continued by agreement to April 11, 1930, and that on that date a judgment by default was rendered in favor of the plaintiff for the amount claimed to be due; but the defendants deny in said petition that they, or anyone with authority from them, made any agreement with the attorney for the plaintiff to continue the case by agreement to March 28, 1930, and aver that they had no knowledge whatsoever of said case being on the trial call on that date, or on the 11th of April, 1930.

Therefore, the question arises, was the case properly before the trial court on April 11, 1930? Bearing upon this question, we have the photostatic copies of the Municipal Court record entries in this case, which were attached to the petition of the defendants, and it appears that on February 26, 1930, the case was set for trial on March 13, 1930, when, by agreement, it was continued to May 28, 1930, and not to March 28, 1930, as contended by the plaintiff. In the record there appears a notation that when the case was continued to April 11, 1930, it was by agreement. However, this last continuance was without notice to the defendants, and it is denied in the petition that there was any agreement entered into between the parties that the case should be set for trial on April 11, 1930. Under the facts as evidenced by the record, of which the photostatic copies are a part, it is conclusive that a mistake was made when the case appeared on the trial calendar of the court of March 28, 1930, and continued to April 11, 1930.

[illegible] the cause was continued to [illegible], [illegible] of the date on which [illegible] secretary of the [illegible] for the [illegible] may appeared on [illegible] to [illegible] not [illegible] in the trial [illegible].

It [illegible] called for trial [illegible] April 11, 1970, and [illegible] but the defendants [illegible] authority from them, [illegible] plaintiff to continue the [illegible] over them had no [illegible] trial [illegible] on [illegible] 1970.

Therefore, the [illegible] before the trial court on April 11, [illegible] we have the [illegible] in this case, which were [illegible] and it appears that on [illegible] on March 18, 1970, [illegible] 1970, and not to [illegible] the record [illegible] to April 11, 1970, [illegible] was without notice [illegible] that there was any [illegible] the case as [illegible] evidence of [illegible] part, it is conclusive [illegible] on the trial [illegible] to April 11, 1970.

The question at issue is, whether the execution and acceptance by the plaintiff of the $13,500 note, secured by a third mortgage on the property owned by the defendants, cancelled the $10,000 note, the basis of this suit.

The facts set forth in the petition are not controverted or contradicted, and the defendants should have been afforded an opportunity to present their defense.

For the reasons indicated, the order denying the prayer of the amended petition is set aside, with directions by this court that leave be granted the defendants to make a defense by the offer of proper evidence upon a trial of the issues involved in this suit, and that the judgment by confession heretofore entered stand as security.

REVERSED AND REMANDED WITH DIRECTIONS.

FRIEND AND WILSON, JJ. CONCUR.

- 2 -

The question is, of course, whether the application of acceptance by the plaintiff [illegible] $10,000 note, [illegible] mortgage on the property owned by the [illegible], cancelled the $10,000 note, the basis of this suit.

The issues are joined in the petition [illegible] varied or contradicted, and the defendants should have been afforded an opportunity to present their defense.

For the reasons indicated, the order sustaining the prayer of the amended petition is set aside, with directions to the court that leave be granted the defendants to make a [illegible] by the office of proper pleadings and a trial on the issues presented in this suit, and that the judgment by [illegible] be [illegible] reversed in accordance.

[illegible]

[illegible]

34782

PEOPLE OF THE STATE OF ILLINOIS, ex rel., PAULINE SUCHSLAND,

Appellee,

v.

JOHN FREUND, JR.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

263 I.A. 639

Opinion filed October 21, 1931

MR. PRESIDING JUSTICE HEBEL delivered the opinion of the court.

This is an action brought in the Municipal Court of Chicago, by the relatrix against the defendant on a charge of bastardy, alleging that the defendant is the father of an illegitimate child of said relatrix, which was born on March 14, 1929,

The case was tried in the Municipal Court before a jury, and resulted in a verdict of guilty against the defendant.

The facts testified to by the relatrix are substantially: That on June 26, 1928, she went to the theatre where the defendant was employed as an usher; that he showed her to a seat, but did not talk to her until the show was over, which was about 12 o'clock at night; that at that time the defendant told her to go up to the ladies' washroom; that she did, and in a few minutes he followed her to that room, where they indulged in an act of sexual intercourse, which was the only time anything of that kind happened to her; that altogether they were in this washroom for a period of one hour and a half; that the theatre was closed at the time of the occurrence; that as a result of this intercourse a male child was born. She admitted on cross-examination that the defendant denied the paternity of the child, and refused to do anything for her. She also admitted that she told her mother, in order to account for her condition when it became apparent,

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that she was at a party on the West Side of Chicago, where she was attacked by a man. She persisted in this story until the child was born, when she admitted that this statement made to her mother was not true.

It also appears from this examination that in June, 1928, the relatrix and her friend Betty Petersen were automobile riding with two young men; that the relatrix and her companion remained alone in the rear seat of the car, and that he tried to take undue liberties with her person.

This was all of the evidence offered on behalf of the relatrix.

For the defendant, there appears in the record the positive denial of the defendant that he had sexual intercourse with the relatrix. There is also the evidence of Dean Carpenter, who was in charge of the ushers at the theatre, that on the night in question he examined every part of the theatre after it was closed, which was a part of his duty, and that on the night of the alleged occurrence the defendant and the relatrix were not present in the ladies' washroom after the theatre was closed.

Henry Burbank, night porter of the theatre, was called for the defendant, and testified to the effect that it was a part of his duty in June, 1928, to inspect all rooms of the theatre after it was closed at night, and that he would close and lock the doors and windows and see that all persons were out of the building; that he would then clean the premises, and for the purpose would use a vacuum cleaner; that this cleaner, when not in use, was kept in a room back of the ladies' washroom; that he had to go through the washroom in order to get this vacuum cleaner; that on the night of the alleged occurrence the defendant and relatrix were not in the washroom after the theatre was closed.

Betty Peterson, a friend of the relatrix, testified, in substance, that they went out together; that on one occasion the relatrix told her that she met a girl while riding on a street car and that she went with this girl and two young men to a kitchenette apartment; that they had something to drink, and the relatrix became unconscious; that when she recovered, the others in the party were sitting around a table, and that was about the time she became pregnant; that again, in June 1938, the witness and the relatrix went automobile riding with two young men, at which time the car was stopped and the witness and her companion got out and walked for ten minutes and returned, and as the witness attempted to open the car door, the young man with the relatrix called out that they had returned too soon; that the witness and her escort finally got into the car, and at that time the young man who was with the relatrix told her to take care of herself when she got home.

It is to be regretted that the Appellee's appearance and brief were not filed, so that the court might have the benefit of the suggestions of the relatrix regarding this record.

It is evident that the relatrix was not truthful when questioned by her mother regarding her apparent condition, and her testimony as to the events is not altogether clear, which makes the evidence adduced by her of doubtful character when that offered by the defendant is considered. While, as a general rule, where the evidence in the record is controverted this court will not weigh the evidence or determine the credibility of the witnesses; but where, as here, the burden is upon the relatrix to establish the paternity of the child by a preponderance of the evidence, it is the duty of the court to act, and another trial is required where the judgment is against the manifest weight of the evidence. People v. Cutler, 200 Ill. App. 469.

[illegible] ...ity petition, [illegible]

in court [illegible], [illegible] they went out together; [illegible]

relativity told her that the men [illegible] girls [illegible]

and that [illegible] with girls and two [illegible]

apartment; [illegible] they had [illegible] [illegible]

unconscious; [illegible] when the [illegible], the [illegible]

were sitting [illegible] table, [illegible] [illegible]

pregnant; [illegible] [illegible] the [illegible]

went [illegible] [illegible]

[illegible] [illegible]

for ten minutes [illegible] [illegible]

the car door. [illegible]

[illegible]

into the [illegible]

relativity [illegible]

[illegible]

and brief [illegible]

of the [illegible]

It is evident [illegible]

when questioned by her father regarding [illegible]

and her testimony as to the events [illegible]

makes the evidence [illegible] by her [illegible]

offered by the defendant is contradicted [illegible]

share the evidence in the report [illegible]

not [illegible] the existence or existence [illegible]

attorney; and there, in fact, [illegible]

establish the [illegible] [illegible]

evidence, it is the only [illegible]

is located where the [illegible]

the evidence. [illegible] v. [illegible], [illegible]

The point is made that when the court entered judgment on September 18, 1930, nunc pro tunc as of July 18, 1930, it was without jurisdiction. However, we find upon an examination of the record that no objection was offered to the entry of this order, and therefore this court will not consider this contention.

For the reason that the judgment of the court is against the manifest weight of the evidence and another trial will be necessary, the judgment entered herein is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

FRIEND AND WILSON, JJ. CONCUR.

[illegible]

judgment on [illegible] it was [illegible] of the [illegible] order, [illegible]

[illegible]

against the [illegible] be needed), [illegible] [illegible] sound [illegible].

[illegible]

[illegible]

34793

PEOPLE OF THE STATE OF ILLINOIS,	)	ERROR TO
Defendant in Error,	)	MUNICIPAL COURT
v.	)	
SAM TIMONI,	)	OF CHICAGO.
Plaintiff in Error.	)	

Opinion filed October 21, 1931

MR. PRESIDING JUSTICE HEBEL delivered the opinion of the court.

This case comes here upon a writ of error. The plaintiff in error, Sam Timoni, hereinafter referred to as the defendant, was charged in an information filed in the Municipal Court of the City of Chicago, with the offense of assault with a deadly weapon. The case was submitted to the court after a jury was waived, and at the conclusion of the hearing, the defendant was found guilty as charged, and judgment was entered by the court to the effect that the defendant be confined for a period of one year in the County Jail of Cook County; and, further, to pay a fine of $1,000. Thirty days after imprisonment, a motion to vacate the judgment was made and denied. The information, which the defendant contends is defective, is as follows:

> "Fred Amstein, a resident of Chicago * * * in his own proper person, comes now here into court, and in the name and by the authority of the People of the State of Illinois, gives the court to be informed and understand, and states the facts to be that Sam Timoni on the 30th day of May, 1930, did then and there with a certain instrument, commonly called a * * _____ said _____ being a dangerous and deadly weapon, without any considerable provocation whatever, and under circumstances showing an abandoned and malignant heart, unlawfully make an assault in and upon one H. J. Friesenhahn, with intent then and there to inflict upon the person of said H. J. Friesenhahn a bodily injury.
>
> (Signed) H. J. Friesenhahn."

One of the points made by the defendant is that the information was not signed and verified by Fred Amstein, who, it appears from the information, obtained leave to file same, but instead was signed and sworn to by H. J. Friesenhahn, and for that reason the court was without jurisdiction to enter the judgment.

This contention would have been good if a motion to quash had been made, and it would have been the duty of the trial court to allow such a motion, but it does not appear from the record in this case that a motion to that effect was made at the time of the trial. Failing to object, the defendant waived this irregularity by proceeding to trial; and likewise, in failing to move in arrest of judgment before judgment was entered. The courts have uniformly held that a defendant may waive any objection to an unverified, or improperly verified information by proceeding to trial without raising the question.

In the case of People v. Duyvejonck, 337 Ill. 638, the rule is fully approved by the court in these words:

> "* * * A verification, or lack thereof, does not affect the jurisdiction of the court where the information charges a crime, and while it is an invasion of his constitutional rights to try the accused on an unverified or improperly verified information, yet such an objection may be waived by the accused and is waived by him by proceeding to trial without raising the objection. * * * In this case the information charged a crime against the laws of the State. While the information was not re-verified after the amendment thereof, no such objection was raised, but plaintiff in error proceeded to trial. Invasion of his constitutional right to be tried on a properly verified information was therefore waived."

To the same effect are the following cases:

People v. Arey, 318 Ill. 305;
People v. Olive, 248 Ill. App. 320;
People v. Conboy, 178 Ill. App. 90.

The facts in the case of People v. Perea, 181 Ill. App. 666, appear to be somewhat similar to those in the instant case. In that case one Benjamin Cohen was the informant, but the information was signed by one Jeremiah Kennelly and was not sworn to by

One of the [illegible] was [illegible] [illegible] information was not given [illegible] [illegible] appears from the information, but [illegible] instead was given and appears to [illegible] reason the court [illegible] without jurisdiction [illegible].

The contention was [illegible] quash had been made, the [illegible] court to allow such a motion, but [illegible] in this case that a motion to [illegible] the trial. Adding to object, the [illegible] by proceeding to trial; and likewise, [illegible] of judgment before judgment was entered. The [illegible] hold that a defendant may waive any objection to [illegible] improperly verified information by [illegible] raising the question.

In the case of [illegible] the rule is fully expressed by the court as follows:

> "[illegible] a verbatim view, or [illegible] the jurisdiction of the court [illegible] charges a crime, and while it is [illegible] citizen's rights to try the accused [illegible] improperly verified information, yet [illegible] be waived by the accused [illegible] to trial without raising the objection. [illegible] the information charged [illegible] state, while the information was not [illegible] amendment thereof, no such objection was [illegible] trial in error proceeded to trial. [illegible] tion I right to be tried on [illegible] was therefore waived."

To the same effect are the following cases:

People v. [illegible], [illegible]
People v. [illegible], [illegible]
[illegible] v. [illegible], [illegible]

The tenor in the case of [illegible] v. [illegible], [illegible] 666, appears to be somewhat similar [illegible] In that case the defendant [illegible] motion was filed by the general [illegible] [illegible]

anyone. No motions to quash or in arrest of judgment were made, and the sufficiency of the information was first challenged in the Appellate Court, and the Court in its opinion said:

> "Plaintiff in error cannot be heard to complain in this court for the first time of the claimed irregularities in the information and the filing of the same. Not having in any way challenged in the trial court the sufficiency of the information, the supposed defects are waived."

The defendant relies on the cases of People v. San Filippo, 255 Ill. App. 554, and People v. Blum, 172 Ill. App. 493. However, these cases are not in point in the instant case. In the Filippo case the defendant made a motion in arrest of judgment, and the Appellate Court in its opinion ruled to the effect that a judgment entered upon an information which is not properly verified must be reversed on writ of error, unless the constitutional right is waived by a failure of the defendant to insist upon it at the trial. In the Blum case it appears from the record that the defendant made a motion in arrest of judgment, and so in that case the question of an improper verification of the information was before the court.

It is next pointed out by the defendant in error that the information is defective in that it does not specify the character of the alleged dangerous or deadly weapon with which the assault was made. The reason for the defendant's contention is that a defendant has the legal and constitutional right to be informed of the nature and cause of the accusation against him, so that he may properly prepare his defense, and also that he may plead the judgment in bar of a subsequent prosecution for the same offense.

The weight of authority in this country seems to be to the effect that it is sufficient to designate the weapon as a deadly one, without specifying the particular weapon. The kind of weapon used is a matter of proof. This is the rule in the following cases:

State v. Tidwell, 43 Ark. 71,
People v. Oppenheimer, 156 Cal. 733,
People v. Haverccol, 81 Cal. 650,

State v. Seamons, 1 Green, 418 (Ia.)
Canterbury v. State, 90 Miss. 279.

In Allen v. People, 82 Ill. 610, cited by the defendant, the Supreme Court approved the case of State v. Seamons, 1 Green (Ia.) 418, and held that this case was in point, in which the Supreme Court of Iowa held an indictment good where it alleges the assault to have been made with a deadly weapon, without any other description of the instrument.

However, the important question is, did the defendant waive the right to question the failure to specify in the information the particular weapon used by failing to make a motion to quash or in arrest of judgment? We believe that he did. The information is in the language of the statute and is specific enough in its allegations to advise the defendant of the nature of the charge and is certain, so that a judgment may be pleaded in bar of a subsequent prosecution for the same offense. The law requires this, and the information is specific enough to meet this requirement.

In the case of People v. Rosenberg, 200 Ill. App. 13 the court held that failure of the information to specify the kind and value of the money must be raised by a motion to quash, and to the same effect are the following cases:

People v. England, 170 Ill. App. 587
People v. Mansfield, 181 Ill. App. 710
People v. Wolf, 199 Ill. App. 445.

The language of the Supreme Court in the case of The People v. Cohen, 303 Ill. 523, is applicable, and fully sustains the views we have expressed in the instant case in these words:

> "The sole question presented for review is the sufficiency of the description of the property stolen, There was no motion to quash the information and no motion in arrest of judgment. Section 9 of division 11 of the Criminal Code provides that all exceptions which go merely to the form of an indictment (or information) shall be made before trial, and no motion in arrest of judgment or writ of error shall be sustained for any matter not

State v. [illegible], 1 [illegible], [illegible] (1[illegible])
Canterbury v. State, 10 [illegible], 78.

In Allen v. [illegible], [illegible] [illegible] filed by [illegible] defendant, the [illegible] Court [illegible] the [illegible] Allen v. [illegible], [illegible] I Green (Ia.) 415, [illegible] held as a [illegible] Supreme Court of Iowa held no [illegible] result to have been made [illegible] description of the instrument.

However, the important question [illegible] the [illegible] waive the right to question the failure to specify [illegible] tion the particular reason upon by taking [illegible] or in arrest of judgment. We believe that [illegible] is in the language of the statute and is [illegible] allegations to enable the defendant [illegible] is certain, so that judgment may be [illegible] prosecution for the same offense. [illegible] information is specific enough to meet this [illegible].

In the case of People v. [illegible], [illegible] the court held that a failure of the [illegible] kind and value of the money [illegible] to the same effect are the following cases:

People v. [illegible], 170 Ill. [illegible], 449
People v. Schaffield, 181 Ill. [illegible]
People v. [illegible], 150 Ill. [illegible]

The language of [illegible]

The People v. [illegible], 273 Ill. [illegible], [illegible]

the views we have expressed in the [illegible]

"The only one that [illegible] sufficiency of the description of the [illegible] there was no motion to quash the [illegible] in arrest of judgment. [illegible] [illegible] judgment does preclude [illegible] to the form of an indictment (or information) [illegible] made before trial, and no motion in arrest [illegible] will of error shall be sent [illegible]

affecting the real merits of the offense charged in the indictment (or information). Petit larceny is not a common law offense but is an offense defined by our Criminal Code. Since petit larceny is defined by and required to be punished under the Criminal Code, which is a codification of the criminal law, the indictment or information must be construed in accordance with the code, and it shall be deemed sufficiently technical and correct if it states the offense in the terms and language of the code or so plainly that the nature of the offense charged may be easily understood by the jury. (Hurd's Stat. 1921, p. 1149; People v. Connors, 301 Ill. 112; People v. Jordan, ante, p. 316.) Great niceties and strictness of pleading should only be countenanced and supported when it is apparent that the defendant may be surprised on the trial, or unable to meet the charge or make preparations for his defense for want of greater certainty or particularity. (Cannady v. People, 17 Ill. 158.) The criminal law is fast outgrowing those technicalities which grew up when the punishment for crime was inhuman and when it was necessary for the courts to resort to technicalities to prevent injustice from being done. Those time have passed, for criminal law is no longer harsh or inhuman, and it is fortunate for the safety of life and property that technicalities to a great extent have lost their hold. * * *"

The remaining question to be considered is, did the defendant's motion to vacate the judgment thirty days after its entry have the effect of a motion in arrest of judgment? This motion was ineffective for the reason that in a criminal case the court may vacate or change the judgment where it remains unexecuted, but is without jurisdiction to vacate after the defendant has been incarcerated and begun to serve his sentence under this judgment, which seems to be the fact in the instant case. In support of our conclusion we cite the case of People v. Turney, 273 Ill. 546, and People v. Olive, 248 Ill. App. 230.

However, even though this motion should be considered as a motion in arrest of judgment, it was made too late, for the reason that there was sentence and entry of judgment before the motion was made at the trial. Perry v. People, 14 Ill. 496.

From the conclusion we have reached in this case, it is our opinion that the judgment of the Municipal Court must be affirmed, and the judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

[illegible] the [illegible] of the offense [illegible] indictment (or information). [illegible] common law offense [illegible] criminal code. Since [illegible] required to be [illegible] is a modification of the criminal [illegible] information must be construed [illegible] and it shall be deemed sufficiently [illegible] if it states the offense in [illegible] code or so plainly that the [illegible] charged may be easily understood [illegible] State, 1921, [illegible] People v. London, [illegible] existence of [illegible] authorized when it is [illegible] based on the trial, or [illegible] prosecutions for [illegible] or particularity. (Mennely v. [illegible] criminal law is [illegible] grew up when the [illegible] it was necessary for the [illegible] to prevent injustice from being done. [illegible] for criminal law is [illegible] fortunate for the safety of life and property that technical [illegible] rules to a great extent have lost their [illegible].

The remaining question [illegible]

defendant's motion to vacate the judgment [illegible] entry have the effect of a motion in arrest of judgment [illegible] was ineffective for the reason that in [illegible] vacate or change the judgment after it was [illegible] without jurisdiction to do so. [illegible] ated and began to serve its sentence [illegible] to be the law in the instant case. [illegible] as cite the case of Kenna v. Ingram, [illegible] Ill. [illegible] 243 Ill. [illegible].

However, even though [illegible] as a motion in arrest of judgment, [illegible] reason the [illegible] motion was made in the trial. Clark v. [illegible].

From the consideration [illegible] is our opinion that the judgment of the [illegible] affirmed, and the judgment is accordingly [illegible].

[illegible]

34806

JESSIE FRABOTTA,

Appellee,

v.

EMILY H. MEYER, ALBERT F. MEYER and CITY OF CHICAGO, a Municipal Corporation,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

263 I.A. 639

Opinion filed October 21, 1931

MR. PRESIDING JUSTICE HEBEL delivered the opinion of the court.

This is an appeal by the City of Chicago, one of several defendants, from a judgment in the sum of $1500.00, entered upon a verdict of a jury for that amount. The action of the plaintiff against the defendants is for damages arising out of an injury sustained by her on the 28th day of July, 1928, at 2215 Ogden Avenue, Chicago, by stepping upon an alleged defective coal hole cover. At the close of the plaintiff's case, the defendant, the City of Chicago, moved for a directed verdict, which was denied. Thereafter no evidence was offered by this defendant.

The facts in evidence indicate that an iron rim was attached to the edge of the opening, and that the iron cover, when the hole was covered, fit into a flange of the supporting rim; that on the 28th day of July, 1928, the plaintiff was returning from a visit to the Juvenile Home and was walking on the sidewalk when the accident occurred; that she saw the cover on the hole but did not see anything wrong with it; that when she stepped on to the iron cover it tipped, and she was thrown so that one of her legs fell into this opening, and as a result of this accident she was injured.

It also appears from the evidence that the so-called supporting iron rim was chipped and broken, and was very rusty.

Opinion filed October 21, 1931

The contention of the City is that the court erred in refusing to instruct the jury to find for this defendant, on the ground that the plaintiff was guilty of negligence in stepping upon the coal hole cover. As a general rule, the question of negligence of the defendant and the exercise of ordinary care by the plaintiff at the time of the accident, is for the jury, unless it is clear, as a matter of law, that the plaintiff's evidence does not tend to prove the negligence charged, or to show that due care was exercised by plaintiff at the time of the accident. In this case there is evidence tending to show that the plaintiff exercised due care, and also evidence to support the allegation of negligence charged in the plaintiff's declaration; therefore the court did not err in refusing to instruct the jury to find for the City of Chicago, one of the defendants.

The point is also made that the City did not have either actual or constructive notice of the condition of this sidewalk, such as is charged in the plaintiff's declaration. It was for the jury to determine as a question of fact whether or not the circumstances surrounding the defective condition of the rim and cover were sufficient to give rise to the inference of the existence of the defect for such a length of time as to charge the City with constructive notice. This rule is fully sustained in the City of Chicago v. Gillett, 108 Ill. App. 455, in which the court says:

> "If the appellant did not know of the condition of the walk, the evidence justified the jury in finding that if the walk's condition was not known to the City authorities, it could and should have been known, had they exercised ordinary care in the examination and in the inspection thereof. * * * From this evidence, as well as that on behalf of the plaintiff, showing that the stringer was decayed and rotten the jury had a right to infer, and such inference would seem to be entirely reasonable, that the walk had been constructed for a long time before the accident. If the walk had been so constructed, the natural and ordinary result might have reasonably been expected, viz., that the wood of which it had been constructed would be more or less decayed. It was the duty of the City to have anticipated this result and to have examined the walk and to repair this condition."

[illegible]

In the case of Sherwin v. City of Aurora, 257 Ill. 458, it appears from the evidence that the plaintiff was injured by the giving way of an iron frame with numerous holes, in which were set so-called glass bulls-eyes that were held in place by cement, such as was used on this sidewalk in order to let air and light into the basement rooms of buildings adjoining the sidewalk. The evidence showed that this grating was built of iron beams and cross pieces which were cemented into the sidewalk on one side and rested upon stone pillars at the other end; that when the plaintiff stepped upon the same one of the iron beams fell and broke in two; that it had greatly deteriorated from rust, but that this condition could not have been discovered from the upper surface of the walk. The court in its opinion says:

> "In the case at bar, the proof tended to show that under favorable climatic conditions, the construction was of such a character as might be reasonably expected to last for fifty years. Yet, the City was bound to take notice of the method of construction and the surrounding conditions, and to anticipate the natural and ordinary result of climatic influence, and it was incumbent upon it to make sufficiently frequent examinations to ascertain whether the structure was becoming so deteriorated, through climatic or other natural influences, as to endanger the safety of the public. * * * The jury were fully warranted in believing from the evidence that the defective condition had existed for a length of time and that the most casual examination would have disclosed the dangerous condition of the structure."

The remaining question to be considered is, was the verdict grossly excessive? The charges for medical services of the attending physician and for help necessary to do the housework during the plaintiff's incapacity for three months, as well as the condition of one of her legs, were matters of fact to be considered by the jury, and from these facts we believe that the jury was justified in fixing the amount of damages at $1500.00.

For the reasons indicated, the judgment is affirmed.

JUDGMENT AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

[illegible]

34509

EVA DANZIGER,
Defendant in Error,
v.
LEONA NEWTON,
Plaintiff in Error.

WRIT OF ERROR TO
MUNICIPAL COURT
OF CHICAGO.

263 I.A. 639

Opinion filed October 21, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

Eva Danziger, as plaintiff, recovered a judgment by confession in the Municipal Court of Chicago, against Leona Newton in the sum of $1400.00, which included $157.50 for attorney's fees. Execution on said note issued on March 13, 1929, and was served on March 26, 1929. On October 23, 1929, defendant moved the court to vacate and set aside the said judgment, and in support of said motion presented her verified petition. The court denied the motion, and this writ of error is sued out to reverse the court's order thus entered.

Briefly stated, defendant's petition alleges in substance that the judgment is based upon a note executed by petitioner and secured by a trust deed to real estate in Chicago, Illinois; that at the time of the execution of said note, petitioner was the owner of said premises and thereafter conveyed the same to one Bert Solomon; that there had existed prior to said conveyance a first trust deed on said property superior to the lien of the trust deed securing the note herein sued on; that some time after the conveyance of the premises to Solomon, and without the knowledge of petitioner, said Solomon executed another trust deed conveying the premises to one David Levin, as trustee; that one David Lipman, owner and holder of the notes secured by the first trust deed on said premises, without the knowledge or consent of petitioner,

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executed a certain subordination of lien, making the lien of the note and trust deed owned by him a second lien upon the premises, subordinate to the lien of the trust deed to said David Levin, trustee; that when demand was made under the execution and served upon petitioner on March 26, 1929, she immediately communicated with her attorney in regard thereto, who in turn took the matter up with one Milton Hart, as attorney for said Solomon, and that Hart in turn took the matter up with David Lipman, resulting in an agreement between Hart and Lipman pertaining to said judgment and the payment thereof, "unknown to this affiant"; that thereafter garnishment proceedings were instituted against the agents collecting rents upon said premises, which were subsequently dismissed.

The petition then proceeds to allege that on or about the 16th day of October, 1929, "notwithstanding the agreements made by said David Lipman, as aforesaid, to which said agreements and understandings this affiant in no wise participated or was in any wise concerned, or to which this affiant in any wise consented or acquiesced, the said David Lipman * * caused a levy to be made upon property of this affiant in the premises at 4058 South Parkway in the City of Chicago, and has had a custodian in charge and control thereof since that day and date."

The petition thus purported to state facts constituting a meritorious defense to plaintiff's claim, as well as to explain the delay of approximately seven months that elapsed between the date when execution was served upon defendant and the motion made to vacate said judgment.

It is insisted that the court erred in denying petitioner's motion to vacate the judgment. The rule is well settled, however, that a motion to vacate is addressed to the sound discretion of the court, and the petition in support of the

motion must show both merit and diligence. Where it appears that defendant had knowledge of the judgment and slept on her rights, the trial court, within its discretion, may deny the motion to vacate. (Freeman v. Counsell, 303 Ill. App. 333). This court will not reverse unless it appears that there has been an abuse of that discretion.

The petition relied upon makes no charge or allegation of fraud or undue influence. Nowhere in the petition is there a statement that defendant ever talked with plaintiff or her authorized representatives in negotiating for a satisfaction of the judgment. The matters presented by the petition disclose facts and occurrences between Lipman and Solomon with which defendant, by her own admission, was in no wise associated either in person or by counsel. These negotiations, being unknown to defendant, obviously could not account for nor have caused the delay of seven months in making the application to have the judgment set aside. The facts, as alleged in the petition, fail to show such diligence as the law requires, and the court, acting properly within its discretion, denied the motion to vacate the judgment.

For the reasons stated the judgment of the Municipal Court will be affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

motion must show [illegible] . [illegible]
defendants [illegible]
the trial court's [illegible] decision, [illegible]
vacate. (Freeman v. [illegible] , [illegible] . [illegible]
will not reverse [illegible]
that theory.

[illegible]
of fraud or undue [illegible]
statement in a [illegible]
authorized [illegible] expert [illegible]
the judgment. [illegible]
and conferences [illegible]
by her own [illegible]
or by counsel. [illegible]
obviously [illegible]
seven months [illegible]
said. For [illegible]
diligence [illegible]
within its [illegible]
[illegible]
Court will [illegible].

[illegible]

34793

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
v.
DOMINICK SILVANA,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

Opinion filed October 21, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

On May 31, 1930, an information was filed in the Municipal Court of Chicago against defendant, charging him with the offense of assault with a deadly weapon. Trial by jury was waived, and the court after hearing the evidence found the defendant guilty "in manner and form as charged in the information herein", and sentenced him to imprisonment for one year in the County Jail, and to pay a fine of $1,000.

The information and affidavit filed are as follows:

"Fred Amstein, a resident of the City of Chicago, in the State aforesaid, in h . . . own proper person comes now here into Court and in the name and by the authority of the People of the State of Illinois, gives the court to be informed and understand, and states the facts to be that Dominick Silvana, heretofore, to wit, on the 30th day of May, A. D. 1930, at the City of Chicago, in said State of Illinois aforesaid, then and there being, did then and there with a certain instrument commonly called a . . . . ., said , . . . being a dangerous and deadly weapon, without any considerable provocation whatever, and under circumstances showing an abandoned and malignant heart, unlawfully, wilfully, and maliciously make an assault in and upon one H. J. Friesenhahn, with intent then and there to inflict upon the person of said H. J. Friesenhahn a bodily injury, contrary to the statute in such case made and provided and against the peace and dignity of the People of the State of Illinois.

H. J. FRIESENHAHN

STATE OF ILLINOIS)
CITY OF CHICAGO) ss.

H. J. FRIESENHAHN, being first duly sworn, on oath deposes and says that he resides at 2724 So. Wells Street; that he has read the foregoing information by h. . . subscribed and knows the contents thereof and that said information and the matters and things therein stated are true.

Opinion filed October 21, 1931

H. J. FRIESENHAHN

Subscribed and sworn to before me this 31 day of May, A. D. 1930.

Edgar A. Jonas."

Defendant was represented by counsel upon the hearing of said cause. After defendant was sentenced the bailiff of the court was directed to deliver him to the keeper of the County Jail, who was commanded to receive and confine him there during said term of imprisonment. No stay of commitment was entered by the court.

As grounds for reversal defendant urges (1) that the information was not signed and sworn to by the informant who obtained leave of the court to file the same and by reason thereof the trial court had no jurisdiction to render the judgment; (2) the information fails to aver the character of the dangerous and deadly weapon with which the alleged assault was made, without which no crime beyond a mere assault is charged.

With reference to the first ground urged, it appears that defendant made no motion to quash the information, nor was its sufficiency in any way questioned upon the trial of the cause. The record discloses that on July 18, 1930, being thirty days after the entry of the judgment and sentence, and after defendant had been committed to the County Jail, a motion to vacate the judgment was entered. This motion was continued to July 23, 1930, and on that day overruled. While it may be conceded that the verification to the information was undoubtedly defective because of the variance between the name of the person presenting the information and the signature attached to the affidavit, the defendant waived this defect by proceeding to trial thereon. Had defendant moved to quash the defective information, it would have been the duty of the court to have sustained his motion and the defect could then have been easily remedied by the filing of an amended information. Since defendant elected to stand trial upon the information presented he waived his constitutional rights. It was so held in People v.

[illegible]

Subscribed and sworn to before me this [illegible] day of May, A. D. 1950.

[illegible] Jones,

Defendant was forced out by counsel upon the hearing of said cause. After reload of the sentenced the judgment of the court was directed to deliver him to the sheriff of the county jail, who was commanded to receive and execute the sentence of imprisonment. No step of commitment was entered by the court.

The remedy for a verdict taking no case (1) that the information was not signed and sworn to by the informant who obtained leave of the court to file the same and by reason thereof the trial court had no jurisdiction to render the judgment; (2) the information fails to aver the character of the dangerous and deadly weapon with which the alleged assault was made, without which no crime beyond a mere assault is charged.

With reference to the first ground urged, it appears that defendant made no motion to quash the information, nor was its sufficiency in any way questioned upon the trial of the cause. The record discloses that on July 14, 1950, being thirty days after the entry of the judgment and sentence, and after defendant had been committed to the county jail, a motion to vacate the judgment was entered. This motion was continued to July [illegible], 1950, and on that day overruled. This it may be conceded that the verification to the information was undoubtedly defective because of the reference between the name of the person presenting the information and the signature attached to the affidavit, but defendant waived this defect by proceeding to trial thereon. And defendant moved to quash the defective information, it would have been the duty of the court to have sustained his motion and the defect would then have been easily remedied by the filing of an amended information. Once defendant elected to stand trial upon the information presented he waived his [illegible] right. It was so held in Jones v

Duyvejonck, 337 Ill. 636, wherein the court said that while it is an invasion of a defendant's constitutional rights to try him on an unverified or improperly verified information, "yet such an objection may be waived by him by proceeding to trial without raising the objection".

In People v. Perca, 181 Ill. App. 668, one Benjamin Cohen was the informant, but the information was signed by Jeremiah Hennelly and was not sworn to by anyone. The defendant stood trial without making any motions to quash or in arrest of judgment and in no way raised the question of the sufficiency of the information upon the trial. In discussing this phase of the case the court said:

> "Plaintiff in error cannot be heard to complain in this court for the first time of the claimed irregularities in the information and the filing of the same. Not having in any way challenged in the trial court the sufficiency of the information, the supposed defects are waived."

People v. Conboy, 178 Ill. App. 90, is to like effect.

As to the second ground, namely, that the information fails to aver the character of the dangerous and deadly weapon with which the alleged assault was made, the weight of authority is to the effect that an allegation stating that the weapon used was a deadly weapon, without specifying the name thereof, is sufficient. Allen v. People, 82 Ill. 610, which is one of the cases relied upon by defendant, states that " the case of The State v. Seaman, 1 Green, 418, is in point, where the supreme court of Iowa held an indictment good where it alleges assault to have been made with a deadly weapon, without any other description of the instrument." In People v. Cohen, 303 Ill. 523, the sole question presented for review was the sufficiency in the indictment of the description of the property stolen. There likewise no motions were made to quash the information or in arrest of judgment. The court in its opinion said:

> "Petit larceny is not a common law offense but is an offense defined by our Criminal Code. Since petit larceny is defined by and required to be punished under the Criminal

Davenport, 347 Ill. 256, wherein the court [illegible] as an invasion of defendant's constitutional rights, [illegible] to be on unverified by impartial, written information, [illegible] objection may be waived by him by proceeding to trial without raising the objection".

In People v. [illegible], [illegible], the defendant [illegible] taken was the informer, and the preliminary was [illegible] by [illegible] Kennedy and was not sworn to by anyone. [illegible] without making any motions to quash or in arrest of judgment, and in no way raised the question of the sufficiency of the information upon the trial. In discussing this case, [illegible] the court said:

> "Plaintiff in error cannot be heard to complain in this court for the first time of the criminal proceedings in the information and the filing of the same. [illegible] in any way challenged in the trial court the sufficiency of the information, the supposed defects are - [illegible]."

People v. Dooley, 118 Ill. [illegible], is to the same effect.

As to the second ground, namely, that the information fails to aver the character of the [illegible] upon which the alleged assault was made, the [illegible] of authority is to the effect that an allegation stating [illegible] the [illegible] deadly weapon, without specifying the same thereof, is sufficient. Allen v. People, [illegible] Ill. [illegible], which is one of [illegible] relied by defendant, at the [illegible] of the [illegible], [illegible], 416, is in point, where the supreme court of [illegible] the indictment good where it alleges assault to be [illegible] "[illegible]" without any other description of the instrument. In People v. [illegible], 303 Ill. 484, the note question presented for review was the sufficiency in the indictment of [illegible] description of the property stolen. There likewise no motions were made to quash the information or in arrest of judgment. The court in its opinion said:

> "Petit larceny is not a common law offense but is an offense defined by and created by statute. Since petit larceny is defined by and created by statutes under the criminal

Code, which is a codification of the criminal law, the indictment or information must be construed in accordance with the code, and it shall be deemed sufficiently technical and correct if it states the offense in the terms and language of the code or so plainly that the nature of the offense charged may be easily understood by the jury. (1 Hurd's Stat. 1921, p. 1149; People v. Connors, 301 Ill. 112; People v. Jordan, ante p. 316.) Great niceties and strictness of pleading should only be countenanced and supported when it is apparent that the defendant may be surprised on the trial, or unable to meet the charge or make preparations for his defense for want of greater certainty or particularity. (Cannady v. People, 17 Ill. 158.) The criminal law is fast outgrowing those technicalities which grew up when the punishment for crime was inhuman and when it was necessary for the courts to resort to technicalities to prevent injustice from being done. These times have passed, for criminal law is no longer harsh or inhuman, and it is fortunate for the safety of life and property that technicalities to a great extent have lost their hold."

The information before us charged every element of the offense as defined in the statute. The name of the weapon was merely a matter of evidence. Defendant knew whether or not he made an assault with intent to inflict bodily injury upon the informant without any considerable provocation and under circumstances showing an abandoned and malignant heart. If he did not make such an assault he could properly prepare his defense, whether the information averred the name and nature of the deadly weapon alleged to have been used by him or not, and if he did make such an assault he had all the information necessary as to the name and nature of the deadly weapon used by him. Had he considered it necessary to have additional information, before proceeding to trial it would have been a simple matter to have moved for a bill of particulars describing the weapon alleged to have been used by him. No such motion was made, however, but he proceeded to trial upon the information,, and we believe that by so doing he waived any right to question the sufficiency of the information in this court as to matters of form.

Some contention is made that the motion to vacate the judgment thirty days after imposition of sentence had the effect of a motion in arrest of judgment. We cannot agree with this contention,

[illegible] code, which is a possible bar of the criminal act, by information or information that is contained in some other [illegible] the code, and is [illegible] multiplicity [illegible] correct if it states the offense in the terms [illegible] the code or in language [illegible] of the offense charged may be easily understood by the jury. (Wright v. [illegible], 1921, P. 1140; People v. Gordon, 5a. 111, 113; People v. Jordan, [illegible] P. 1[illegible]. [illegible] at trial [illegible] only be [illegible] and [illegible] that the defendant may be informed [illegible] the charge or make [illegible] defense for [illegible] of prior convictions [illegible]. (People v. [illegible], 17 Ill. 152.) The trial of a [illegible] technicalities which give no [illegible] for crime [illegible] human and when it was passed by [illegible] technicalities to prevent injustice [illegible]. These times have passed, for criminal law is no longer prey of [illegible] human, and it is [illegible] that technicalities to a great extent have lost their hold."

The information before us charges an offense in every respect in the offense as defined in the statute. [illegible] a matter of evidence. [illegible] with intent to inflict bodily injury upon the [illegible] considerable provocation [illegible] and willfully [illegible] properly prepare his defense, [illegible] and nature of the deadly weapon alleged to have been used by him or not, and if he did use such a weapon [illegible] as to the name and nature of the deadly weapon used by him. [illegible] considered too [illegible] to trial in some [illegible] of particular description [illegible] no such action [illegible] information, and [illegible] question the sufficiency of [illegible] of form.

[illegible] judgment sixty days after [illegible] a motion in arrest of judgment. [illegible]

however, because after commitment the trial court lost jurisdiction to change its sentence. It was so held in People v. Turney, 273 Ill. 546. Motions in arrest of judgment must be made before the defendant is committed.

We find no reversible error in the record and the judgment and sentence of the trial court will therefore be affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

No. 34797 and 34972,
Consolidated under
No. 34797.

DOROTHY M. KRUGER, Appellee, v. MILTON C. KRUGER, Appellant.	)	APPEAL FROM SUPERIOR COURT COOK COUNTY.

Opinion filed October 21, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

A decree of divorce was entered in the Superior Court of Cook County in favor of complainant, Dorothy M. Kruger, against Milton C. Kruger, on March 29, 1922, under the terms of which complainant was awarded the custody of their minor child, Richard.

On June 4, 1927, defendant filed his petition in said cause, alleging that complainant had been adjudged insane by an order of the County Court of Cook County on March 30, 1927, and for that reason was not a fit person to have custody of the child, and petitioner prayed that a guardian be appointed for said minor. The court acting upon the petition entered an order providing that the care, custody, control and education of said minor be granted to the defendant until the further order of the court.

On the 20th day of June, 1930, complainant filed her petition in said cause, alleging in substance the terms of the original decree of divorce awarding her the custody of the child, and that said child continued to live with her until the latter part of February, 1927, when by reason of ill health she was ordered by her physician to take an ocean trip with her father; that she then placed said child in the Sherwood School and went abroad; that upon her return to New York in March, 1927, she received a telegram stating that the defendant had, without her knowledge or consent, taken the child from the Sherwood School and placed him in the

charge of his brother, Irving L. Kruger; that defendant, the father of said child, does not live in the home of his brother, Irving, and in the necessary conduct of his business is required to be out of the City of Chicago for at least six months of each year, and when he is in the city, sees the child only on rare occasions; that the mental shock caused by the removal of said child from the Sherwood School resulted in a complete nervous collapse and mental disorder to petitioner, so that upon her return to Chicago on the 30th day of March, 1927, the County Court of Cook County ordered her to be committed to the care and custody of her father, Herman R. Misch, and it became necessary for her to be confined to a sanitarium in Milwaukee, Wisconsin; that she has completely regained her health and was on the 13th day of April, 1928, discharged from the care and custody of her father by the County Court of Cook County, and was found to have fully regained her health and reason and was restored to all the rights and privileges of a sane person; that during the time petitioner was in the sanitarium at Milwaukee, Wisconsin, her father consented to an order modifying the decree, pursuant to an understanding with defendant that should petitioner regain her health the terms and conditions of the original decree would be reinstated and petitioner again be given the sole care, custody, control and education of the minor child, who at the time of the filing of the petition in 1930 was nine years of age.

The petitioner further alleged that she had been refused the privilege of seeing her child except for a few hours on Sundays; that said child was living with the brother of the defendant, who has a child of his own; that her child was not receiving a mother's love, care and attention, but on the contrary was being prejudiced against his mother; that through the assistance of her father,

charge of his brother, Irving, [illegible] shall not [illegible], the [illegible] of said child, does not give to the [illegible] [illegible], [illegible], and in the necessary [illegible] of his business to remain to be out of the City of Chicago for a [illegible] period of [illegible] years, and when she is in the city, has the child only on visits; that the mental shock [illegible] by the removal of the child from the Sherwood School resulted in a nervous [illegible] [illegible] and mental disorder to [illegible], [illegible] on the 30th day of March, 1917, the County Court in said County ordered her to be committed to the care and custody of her father, Herman F. Klaus, and it became necessary for her to be [illegible] to a sanitarium in Milwaukee, discovering that she has completely regained her health and was on the 12th day of [illegible], 1917, discharged from the care and custody of her father by the County Court of Cook County, and she found to have the [illegible] and reason and was restored to all the rights and privileges of a sane person; that during the time [illegible] in the [illegible] at Milwaukee, [illegible], a lawsuit [illegible] and a modifying the decree, returned to a [illegible], with testimony that should petitioner regain her health [illegible] [illegible] original decree would be [illegible] sufficiency [illegible] the sole care, custody, control and education of the minor child, who at the time of the filing of the petition in 1920 was [illegible] years of age.

The petitioner further alleges that she has been refused the privilege of [illegible] her child except for [illegible] on Sundays; that said child was living with her brother, [illegible], who has a child of his own; that her [illegible] mother's love, care and attention, but on the contrary was being [illegible] against his mother; that [illegible] the [illegible] of her father,

petitioner was amply able to support and care for the minor child and supply him with all the necessities of life, clothing and education, and she prayed that the order modifying said decree entered on June 17, 1927, be reversed and held for naught, and the terms of the original decree awarding her the care and custody of the child be restored in full force and effect.

To this petition the defendant filed his answer admitting the proceedings alleged in the petition, and averring that ever since the marriage of petitioner and defendant the former has continued to suffer from mental diseases and derangement, had neglected their child by allowing him to be placed in the care and control of nurses, maids and others, and keeping him at hotels where petitioner lived; that defendant kept and maintained the minor child at the home of his brother, who is married, where he received proper care and attention, and denied being absent from the city in excess of six weeks a year; also denied any understanding or agreement with the father of petitioner that the terms and conditions of the original decree should be reinstated if petitioner should regain her health.

After an extended hearing before the chancellor, during which the testimony of many lay witnesses and some physicians was heard, the court ordered that the minor child be restored to the custody of petitioner. By the appeal in case number 34797, defendant seeks to reverse that order.

It is urged on behalf of defendant that (1) the decree of June 17, 1927, awarding the custody of the child to the husband is res adjudicata, and (2) that there is no evidence in the case tending to show that anything happened subsequent to June 17, 1927, which would warrant the court in modifying the order of that date.

With reference to the first contention, we regard

[illegible]

Section 19, Chapter 40, of the Illinois Revised Statutes, as controlling. This statute provides that "the court may, on application, from time to time, make such alterations in the * * care, custody and support of the child as shall appear reasonable and proper." Under the provisions of the statute and decisions construing the same the chancellor clearly had jurisdiction to entertain the petition. If upon a full hearing the evidence warranted the conclusion that the welfare of the child would be best served by restoring the child to the care, custody and control of its mother, he had jurisdiction to modify the order. In reaching such conclusion, the child's welfare was the paramount consideration, and the mother's fitness, the circumstances attending the child's custody with the father and other issues made up by the pleadings were properly inquired into, and upon review the chancellor's conclusions will not be disturbed unless they are contrary to the manifest weight of evidence as disclosed by the record.

While it is true that a court will not be bound by any alleged agreements made between the father of petitioner and defendant, it appears clearly from the record in the case and all of the circumstances that defendant was given custody of the child in 1927 solely because of petitioner's ill health. No other reason is suggested. Petitioner had procured the decree of divorce against her husband on grounds of extreme and repeated cruelty and in the original decree was awarded the custody of the minor child. No reason appears in the record for taking the custody from petitioner, as originally provided in the decree, except her ill health, and it seems to us that upon a showing by her that she has been fully restored to good health and is amply able to take care of her child, the court was fully justified in making the amended order of 1930.

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and upon review the [illegible]
unless they are [illegible]
disclosed by the record.

While it is [illegible]
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the court was [illegible]

Defendant cites several decisions in support of his point that the decree of June 17, 1927, is res adjudicata. These cases hold, in effect, that the inquiry, after the original decree, is limited to matters set up in the petition arising since the entry of the decree, and that a decree fixing the custody of a child is final on the conditions then existing, and should not be changed afterwards unless on altered conditions since the decree or on material facts existing at the time of the decree but unknown to the court, and then only for the welfare of the child. We are of the opinion that the petition sufficiently alleged circumstances arising since the original decree and subsequent to its modification in 1927, when supported by competent evidence, to warrant the chancellor's order.

The question of jurisdiction underlying the appeal in case number 34972 was determined by us in a written order, number 34798, filed on January 13, 1931, and was finally disposed of, as we view it, by a denial of certiorari by the Supreme Court in case number 20826.

There being no other question before us, the order of the Superior Court of October 22, 1930, is accordingly affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

[illegible]

34812

UDELL RICKLES, a minor, by DAVID RICKLES, her father and next friend,

(Plaintiff) Appellee,

v.

CITY OF CHICAGO, a Municipal Corporation,

(Defendant) Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

Opinion filed October 21, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

Udell Rickles, a minor, by David Rickles, her father and next friend, brought an action on the case against the City of Chicago, in the Superior Court of Cook County, seeking to recover damages for personal injuries alleged to have been received by her through falling on a defective street pavement on a public street in the City of Chicago. The case was tried before the court and a jury, resulting in a judgment for plaintiff in the sum of $6,000.00.

The evidence discloses that plaintiff, a girl about fourteen years of age, resided with her mother and father on West 16th street in the City of Chicago; that on the evening of March 19, 1922, between six and seven o'clock P. M., just at dusk and before the street was lighted, she crossed 16th street from the north in front of the premises known as 3551 West 16th street, which was about four stores from the corner of Central Park avenue, and proceeded south toward the store across the street owned by her parents; that 16th street is a wide thoroughfare, with two street car tracks running along the middle thereof, and that considerable traffic was passing in both directions at the time in question. After crossing the rails plaintiff stepped into a hole in the pavement, which is described as being approximately three feet in diameter and one foot deep, falling on her side and sustaining the injuries complained of.

Opinion filed October 25, 1951

The evidence disclosed that the hole in the pavement had been in existence continuously for a period of about four months prior to the accident, and that on at least two other occasions people had fallen into the same hole; that because of the heavy traffic along the street at the time, plaintiff's attention was directed chiefly to watching the traffic for her own safety in crossing, and she testified that she did not observe the hole in the pavement and could not look down because she was required to look in both directions for passing automobiles, street cars and other vehicles.

Defendant adduced no evidence to contradict the manner in which the accident happened and no point is made as to the size of the verdict or the extent of injuries sustained by plaintiff. Neither is there any complaint because of the improper admission or rejection of any evidence, nor as to the giving or refusal of instructions. Defendant's sole contention is that because the hole in the pavement had been there for several months and plaintiff lived on the premises close to the defective pavement, she should have known of its existence and avoided the same; and that her failure to do so amounted to contributory negligence on her part as a matter of law, by reason whereof the court should have peremptorily instructed the jury for defendant.

The question whether the city owed plaintiff any duty to maintain the highway free from defects and suitable for use by pedestrians between the intersections along 16th street was not raised by defendant upon the trial nor is it raised here. Consequently we are not required to advert thereto.

The law in this state is well settled that contributory negligence is always a question for the jury, except when the evidence of its existence is so clear that no reasonable minds could arrive at a contrary conclusion. (Lannon v. City of Chicago, 159

The evidence disclosed that [illegible] in existence continuously for [illegible] to the accident, [illegible] fallen into the [illegible] along the street at the time. [illegible] to watching the traffic [illegible] testified that she did not [illegible] could not look [illegible] directions for passing automobiles, [illegible] manner in which the accident [illegible] the fault or the negligence of plaintiff. Neither is there any [illegible] the insurer substitution or rejection of any instrument [illegible] of instructions. Defendant's sole contention is [illegible] hole in the pavement had been in [illegible] lived on the premises close to [illegible] have known of its existence and [illegible] failure to so remove it [illegible] as a matter of law. By proper [illegible] torily instructed the jury [illegible].

The question whether [illegible] to maintain the sidewalk [illegible] by petitions between the intersections [illegible] by defendant upon the [illegible] we are not required to [illegible].

The law in this state [illegible] contributory negligence is always a question for the jury, except [illegible] evidence of the existence is so clear that no reasonable [illegible] arrive at a contrary conclusion. Ingham v. City of [illegible], 108

Ill. App. 595; C. & E. I. RR. Co. v. Snedaker, 223 Ill. 395). Counsel for the city argue that the proof discloses a want of ordinary care by plaintiff for her own safety, and quote excerpts from the evidence to sustain their contention. An examination of this and other evidence discloses, however, that plaintiff had not noticed the hole in the pavement; that on the evening in question her attention was directed mainly to looking east and west for passing traffic as she crossed the street, and that she did not look down at any time toward the pavement. These facts were all presented to the jury in connection with other circumstances and evidence showing the existence of the defective pavement for a long period of time, and no countervailing proof was offered by the city. Under the circumstances we believe that the question of contributory negligence was clearly a question of fact for the jury, and we see no force to defendant's contention that upon plaintiff's own evidence the court should have directed a verdict for defendant.

Several witnesses testified on behalf of plaintiff that the hole in the pavement had existed for several months and in the absence of any proof to the contrary, it will be presumed that the city had implied notice and knowledge of the defective pavement. (Brownlee v. Village of Alexis, 39 Ill. App. 135; City of Chicago v. Dalle, 115 Ill. 386.)

Under the instructions given by the court the jury was called upon to determine whether the defendant was negligent by reason of the hole in the pavement, and whether plaintiff was guilty of contributory negligence in not avoiding the hole which caused the accident. The proof, as disclosed by the record, was all adduced by plaintiff and resulted in the only verdict which the jury could well have rendered under the evidence in the case.

There being no reversible error in the record, the judgment of the trial court will be affirmed.

AFFIRMED.

HEBEL, P.J., and WILSON, J. CONCUR.

[illegible]

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of the locomotive [illegible]

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judgment of [illegible]

34972

DOROTHY M. KRUGER,
Appellee,
v.
MILTON C. KRUGER,
Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

Opinion filed October 21, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

The question arising upon this record is precisely the same as that involved in case General Number 34798. The reasons stated by this court in its order of January 13, 1931 for denying the petition for a writ of mandamus in said cause, require an affirmance of the order of the Superior Court of October 24, 1930.

Said order is accordingly affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

34972

DOROTHY M. [illegible],
a [illegible],
Appellant.

v.

MILTON [illegible],
[illegible].

Opinion filed October 21, 1932

[illegible] the question raised upon this record is [illegible] the case as that introduced in [illegible] Central Court [illegible], the reasons stated by this court in the order of [illegible], 1932, for denying the [illegible] for a writ of mandamus in [illegible], require an affirmance of the order of the [illegible] court of October 24, 1930.

Said order is accordingly affirmed.

[illegible]

MARSH, P.J., and [illegible], J.J., [illegible].

34866

MARY B. CONNOR,
Defendant in Error,
v.
DR. ALEX B. MAGNUS,
Plaintiff in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

45 9

263 I.A. 641

Opinion filed October 21, 1931

MR. JUSTICE WILSON delivered the opinion of the court.

Defendant in error, Mary B. Connor, plaintiff below, brought suit in the Circuit Court against the defendants, Mrs. B. Magnus, Emilie M. Williams and the plaintiff in error Dr. Alex B. Magnus, charging the defendants with malicious prosecution and the unlawful arrest and detention of the defendant in error. The declaration consisted of three counts. The defendant in the cause below, Dr. Alex B. Magnus, filed a plea of the general issue. The cause was reached for trial May 21, 1930, in its regular order on the trial call, and the suit was dismissed as to the defendants, Mrs. Alex B. Magnus and Emilie M. Williams, and proceeded to trial against the defendant, Dr. Alex B. Magnus. On the same day the cause was tried before a jury. The defendant was not present. The trial resulted in a verdict for $10,000 in favor of the plaintiff and, on May 29, 1930, judgment was entered on this verdict. An appeal was allowed but not perfected. Approximately six months later this writ of error was sued out to reverse this judgment.

We are asked to reverse the judgment on the ground that the declaration is defective and does not state a cause of action. It is insisted, (a) that a misjoinder of causes of action renders a declaration bad upon error; and (b) that the declaration does not state a cause of action.

[illegible]

[illegible]

[illegible]

Opinion filed October [illegible], 1[illegible]

A plea of the general issue was filed by the defendant, Dr. Alex B. Magnus, and therefore the question was not tested by demurrer, or otherwise, before the trial court. It necessarily follows that after judgment the declaration must be liberally construed. Anything which may be fairly inferred from the declaration will be regarded as alleged. Wagner v. Chicago, M. I. & P. Ry. Co., 277 Ill. 114.

The declaration consisted of three counts charging malicious prosecution. The first count was against Emilie M. Williams alone; the second and third counts were against the defendants Emilie M. Williams, Dr. Alex B. Magnus and Mrs. Alex B. Magnus. The action was dismissed as to Emilie M. Williams and, as she was the only defendant named in said count, this count fell leaving the two remaining counts which alone charged the defendant Dr. Alex B. Magnus. This action is before us on the common law record alone. There is no bill of exceptions preserving the evidence, instructions or orders entered on the trial.

Every intendment is indulged in to sustain the validity of a judgment and the regularity of the proceedings. It follows that we should properly indulge in the presumption that the jury was instructed to disregard the first count of the declaration. This count taken with the other two counts, however, did not constitute a misjoinder of causes of action. The action was the same in all the counts, namely, an action for malicious prosecution. There was no misjoinder of causes of action. A question as to misjoinder of parties should be pointed out to the trial court and presented by proper pleadings at the earliest opportunity. The plea of general issue filed herein waived the question of misjoinder of parties. Corlett v. Ill. Central Ry. Co. 241 Ill. App. 124.

[illegible]

Dorfett v. [illegible]

The second count of the declaration charged the defendants with falsely and maliciously and without any reasonable or probable cause entering into a conspiracy to cause the unlawful arrest and detention of the plaintiff, and with causing one Emilie M. Williams to file her petition for the issuance of a writ of inquisition against the plaintiff; with appearing before a judge of the county court of Cook County and falsely and maliciously and without any reasonable cause, swearing to a petition charging the plaintiff with being insane and asking that the plaintiff be committed to some hospital or asylum; that the facts could be proven by the defendant Magnus who certified that he had examined the plaintiff and found her to be mentally unsound, which was false; charged that the plaintiff was caused to be arrested and taken into custody and that upon a full hearing being had and after an examination of the plaintiff by comissioners appointed by the court, a report was made by the commission to the county court to the effect that the plaintiff was sane and that thereupon the court ordered that she be discharged and that the petition be dismissed; charged that the plaintiff had been greatly injured in her credit and standing in the community and suffered great anxiety of mind, and had incurred great expense procuring her discharge; charged that she had been hindered and prevented from giving proper care to her business for the space of nine months and was damaged to the extent of $100,000.

The third count is similar to that of the second count.

It is urged as a ground for reversal that the declaration fails to charge that the action in the county court terminated in favor of the plaintiff, and that there is no charge that the proceedings in the county court were terminated prior to the filing of the declaration on July 24th, 1928. This defect could easily have been pointed out by demurrer, but instead was waived by

The second count of the [illegible] charges the defendants with larceny in the county and without any reasonable or probable cause whatever into a [illegible] the [illegible] arrest and detention of the plaintiff. [illegible] the [illegible] W. William [illegible] for the last [illegible] of imprisonment against the plaintiff; [illegible] of the county court [illegible] without any reason [illegible] plaintiff with being insane [illegible] committed to some hospital or asylum [illegible] by the defendant [illegible] plaintiff and found her to be [illegible] observed that the plaintiff was [illegible] unruly and that upon a full hearing [illegible] tion of the testimony by qualified experts [illegible] report was made by the commission to the county court to the effect that the plaintiff was sane and that [illegible] that she be discharged [illegible] that the plaintiff had been [illegible] attending in the community and [illegible] had incurred great expense [illegible] she had been [illegible] confinement for the space of nine months [illegible] extent of $[illegible],000.

The third count is similar to the [illegible] and the second count.

It is urged on [illegible] that the demurrer fails to charge [illegible] terminated in favor of the plaintiff, [illegible] that there is no charge that the proceedings in the county court were [illegible] the rights of the defendant [illegible] [illegible] actually have [illegible] by jurisdiction, but [illegible] by

the filing of the plea of general issue. The allegation in the declaration to the effect that she was ordered discharged by the county judge was sufficient in our opinion, in view of the pleadings and after judgment, to sustain the verdict and judgment.

The declaration was not bad in that it stated no cause of action, but was sufficient upon this hearing in that it stated a cause of action, although defectively.

It is insisted that a judgment against one of numerous alleged conspirators will not support a charge of conspiracy. This, however, was not an action for conspiracy, but an action for malicious prosecution and the allegations in the declaration to the effect that the defendants conspired and confederated together, were surplusage and should have been ignored.

The Supreme Court of this state in the case of Lasher v. Littell, 202 Ill. 551, which was an action for malicious prosecution, in its opinion says:

> "The gist of it is not the conspiracy, but the damage to the plaintiff by the wrongful acts of the defendants; and this is equally actionable whether it be the result of conspiracy or not. As matter of pleading the charge of conspiracy is mere surplusage and only entitled to be looked at as a matter of aggravation, and the insertion of the averment of it does not change the nature of the action at all. It is still an action on the case and to be tried and disposed of accordingly. * * * * *
>
> "In actions for malicious prosecutions, as in most other actions of tort, persons jointly engaged in the acts complained of may be united as defendants, or sued severally in separate suits until plaintiff's claim is barred by the satisfaction of a judgment in his favor. (13 Ency. of Pl. & Pr. p. 427). The case was dismissed as to O. Lasher and Francis W. Savage, and John Johnson was not served. The court did not err in proceeding with the trial of the case as against the appellant. Davis v. Taylor, 41 Ill. 405; Illinois Central Railroad Co. v. Foulks, 191 id. 57."

The judgment may result in hardship to the defendant. On the other hand, the action was reached in its regular course on the trial call, and the trial court refrained from entering judgment

the filing of [illegible]

declaration [illegible] by the

county judge [illegible] the things

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Lester v. Mitchell, [illegible] for [illegible]

prosecution, in its opinion [illegible]

> "The [illegible] by, [illegible]
> damage to the [illegible]
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until several days after the verdict was returned. The writ of error was not sued out until several months after the judgment. No proceedings were taken in the trial court to open up the judgment and, consequently, there is nothing before us to explain the failure of the defendant to appear at the time of the trial. The action was of sufficient importance to warrant some care on the part of the defendant in protecting his rights at the proper time and at the proper place.

We see no reason for reversing the judgment and for the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

34891

AMY KECK, a Minor by EDWARD KECK, her next friend,

Defendant in Error,

v.

GIDEON BARTELS,

Plaintiff in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

263 I.A. 641

Opinion filed October 21, 1931

MR. JUSTICE WILSON delivered the opinion of the court.

Plaintiff, Amy Keck, a minor, by her next friend, brought this action to recover for personal injuries sustained on or about July 26, 1929, by reason of the alleged negligence of the defendant, Gideon Bartels, in the operation of an automobile. A jury returned a verdict for $6,000 in favor of the plaintiff, from which amount $2,000 was remitted and judgment for $4,000 entered. To reverse the judgment this writ of error was sued out.

From the facts it appears that the plaintiff at the time of the injury in question was 15 years of age and was in the act of crossing Cicero avenue in the City of Chicago at its intersection with Medill avenue. Cicero avenue runs north and south and Medill avenue runs into it, but does not continue through. Plaintiff testified that before she started to cross she saw the red lights were on at the corner of Cicero and Fullerton avenues the next crossing north and that the traffic headed south on Cicero avenue at that point was stopped. When she got about half way across the street she saw two trucks coming. She looked again and saw the car which was operated by the defendant passing the trucks on the west side of the street and west of the trucks and coming fast. She started to step back upon the rail of the street car track and was struck by the car which appears to have swung around in front of the trucks. Her right thigh was fractured and there was marked overriding

and displacement of the bone; she had a cut under her right eye, a bruise over the temple, a broken toe and she suffered other bruises about her body; she had a sprained wrist and the front of her leg was scarred; she was in a cast from August until October and on crutches until about the first of March of the following year; she complained of pain in the leg at the time of her trial and inability to walk any great distance.

Witnesses on behalf of the plaintiff testified that the defendant's car was running at the rate of from 35 to 40 miles an hour.

It is urged as ground for reversal that the plaintiff was guilty of contributory negligence. Plaintiff is a minor and the jury had a right to take into consideration her age, in rendering its verdict, together with all the facts and circumstances surrounding the accident. The question of contributory negligence is one of fact which is within the province of the jury to consider and weigh. We see no reason for disturbing the verdict on this ground.

It is also urged that the plaintiff in her testimony referred to some one as a man from the insurance company. This answer was brought out on cross-examination. The witness was asked whether she had ever been called upon by a man by the name of McCoy and she said that she did not recall such a person. She was then asked a number of questions and as to thether or not someone had not called upon her at the hospital and whether or not such person did not ask her certain questions, and she answered that this man was an insurance man. This answer was elicited after repeated efforts on the part of counsel on cross-examination to recall to the mind of the plaintiff visits of someone by the name of McCoy. The record does not disclose whether McCoy was an insurance man or not. When this answer is taken in connection with the number of questions asked along the same line, we are of the opinion that it

was not interjected for the purpose argued for in the brief, namely, to prejudice the jury. The persistent question in regard to the man calling upon her finally elicited this answer; plaintiff did not know who McCoy was and her answer was an attempt to place the man whom counsel was striving to identify with conversation given between her and some unknown person while she was in the hospital.

Upon the trial one of the witnesses was handed a paper by counsel for the defendant and asked to identify it. This paper was not in evidence but the witness was interrogated as to whether or not he did not make certain statements to an investigator, which were supposedly contained in the paper. Upon the trial counsel for the plaintiff in his argument to the jury commented on the fact that the statements of the witness on the trial were no different from those made to some one on behalf of the defendant, who took down his statements. The statement was not introduced in evidence but we see no reason why counsel could not comment on the fact that the witness had been interrogated concerning it. Moreover, an objection was made on behalf of counsel for the defendant to the statements of counsel for plaintiff made in the closing argument and the court sustained the objection.

We find no reversible error in the record and the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

34945

47 A

H. G. ANDERSON,

(Plaintiff) Appellee,

v.

FREDERICK W. LUCKE, doing business as F. W. LUCKE BRICK CO.,

(Defendant) Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

263 I.A. 641

Opinion filed October 21, 1931

MR. JUSTICE WILSON delivered the opinion of the court.

Plaintiff, H. G. Anderson, brought his action, to recover for services rendered, against the defendants, Frederick W. Lucke, James F. Lucke and Russel S. Lucke, doing business as F. W. Lucke Brick Co. An affidavit for attachment in aid was filed against the defendants doing business under the name of F. W. Lucke Brick Co. The statement of claim in the principal action charged that the defendants owed the plaintiff $1,714.37. This statement of claim was subscribed and sworn to. Each of the defendants filed his answer denying that he was indebted to the plaintiff in the sum set out in the statement of claim or in any sum whatsoever. The cause was tried before the court without a jury. Upon the trial the attachment was dismissed and thereupon plaintiff dismissed the suit as to the defendants, Russell S. Lucke and James F. Lucke and proceeded against Frederick W. Lucke, individually, doing business as F. W. Lucke Brick Co. The court found in favor of the plaintiff and against the defendant, Frederick W. Lucke, and entered judgment, from which judgment this appeal was taken.

Opinion filed October 21, 1931

It is insisted that the court erred in entering judgment against the individual because the action was a joint action and all the parties defendant should have been discharged. Plaintiff, however, had a right to amend his pleadings and to proceed individually against the single defendant.

It is further insisted that the court erred in entering judgment in favor of the plaintiff because of a total lack of proof as to the amount due. The record contains no evidence on the part of the plaintiff showing what work was done or its reasonable value. The trial court evidently proceeded on the theory that the statement of claim being sworn to, was sufficient. The following colloquy took place between the court and counsel:

> "Mr. Schall: Your Honor, there was no proof whatever presented of the amount owing except that $2,500 that was presented here on that statement.
> The Court: There isn't any dispute in the pleadings at all about it.
> Mr. Schall: There is a denial in the affidavit of merits and plea.
> The Court: There isn't any dispute as to the amount here at all.
> Mr. Schall: There is in the affidavit of merits.
> The Court: No, there isn't, except on behalf of these other two defendants, and that will be the order."

The record discloses the fact that the defendant here, as well as the other two defendants, in his affidavit of merits denied that he owed the plaintiff the sum, alleged in the statement of claim, or any part thereof. This affidavit of merits by the defendant was subscribed and sworn to. Under the circumstances it was incumbent upon the plaintiff to make proof in order to recover.

Our attention is called to the fact that the abstract filed in this court is almost a verbatim copy of the entire

common law record as well as the evidence presented upon the trial. It is insisted that the abstract of the record should be stricken from the files and the judgment affirmed. We agree with counsel that the abstract filed in this cause does not comply with the requirements of the court. It is against the rule of this court to set out all orders, pleadings and testimony in full. The record, however, is not long and, while we condemn the practice of presenting this court with abstracts of the kind and character filed herein, nevertheless, we feel that justice requires that there should be a rehearing of the cause in order that the judgment might conform to the facts regarding the actual amount due and owing the plaintiff.

For the reasons stated in this opinion, the judgment of the Municipal Court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

34956

GRACE LANDON, (Complainant),

Appellee,

v.

WILLIAM HALE THOMPSON, Mayor of the City of Chicago and JOHN H. ALCOCK, Commissioner of Police of the City of Chicago, (Defendants),

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

263 I.A. 641

Opinion filed October 21, 1931

MR. JUSTICE WILSON delivered the opinion of the court.

The complainant, Grace Landon, filed her bill of complaint in the Circuit Court praying for an injunction against William Hale Thompson, Mayor of the City of Chicago, and John H. Alcock, Commissioner of Police, to restrain them from interfering with her in the conduct and operation of a bath and massage parlor on the premises known as Nos. 12 and 14 West Washington street, Chicago The business or establishment was conducted in the name of "B. & M. Institute, Not Inc.", under a lease from September 1, 1927, to August 3, 1930, at a rental of $800 per month. The bill prayed for an injunction against the defendants and their agents, attorneys, detectives and patrolmen from interfering with her in the conduct of her business and from molesting her patrons by intimidation, constant surveillence, and threats of arrest.

From the evidence it appears that the complainant had about two years training as a practical nurse and 8 months training in a massage school and had received a certificate evidencing the course which she had taken; that she had been operating a similar establishment to the one in question since about 1908 in Chicago; that her business was patronized by both male and female patrons; that the premises in question were equipped with paraphernalia for the transaction of a bath and massage business, including

34056

GRACE [illegible],

[illegible],

v.

WI[illegible] FOR [illegible], [illegible] of
the City of Chicago [illegible]
ALGOCK, Commissioner of Police
of the City of Chicago, [illegible]

[illegible].

Opinion filed October 21, 1951

[illegible]

complaint in the circuit [illegible] or [illegible]
William Dale Thomson, [illegible] or [illegible]
Alcock, Commissioner of Police, to [illegible] trespass
with her in the conduct and [illegible] on the premises known as No. [illegible]
The business or establishment was [illegible] in the name of [illegible]
Institute, [illegible], under [illegible] September 1, [illegible], to
August 3, 1950, [illegible] for
an injunction [illegible] detectives and patrolmen [illegible]
of her business [illegible]
consent surveillance, [illegible].

[illegible]

had about two years' [illegible]
training in [illegible] to
the course which she had [illegible]
military establishment [illegible] about 1938
in Chicago; that her business [illegible]
premises; that the [illegible] and
nally for the transaction [illegible] business, including

tubs, electric cabinets, needle showers, therapeutic lamps, massage or treatment tables, etc.; that in order to carry on the business she had had special plumbing and water pipes laid in the floor of the establishment; that she had expended from $3,000 to $4,000 for the equipment and that she derived from $150 to $200 a month net profit from the business; that on September 10, 1928, certain officers of the law entered the premises without a warrant, went through the premises and asked her patrons what they were doing; that they later entered the premises on several occasions and at times there were as many as six or seven of them present making an uproar and threatening to close up the premises.

The complainant testified that, as a result of these actions, numerous patrons had refused to patronize her, that she had no adequate remedy at law, and that her business would be destroyed if the action of the police continued. She testified further that there were never any disturbances on the premises and that at one time, without any warrant, they took her and her employees to the Central Station; that after a hearing she was discharged.

The cause was referred by the chancellor to a master in chancery who took the testimony and reported back his findings. The master found that the business of the complainant was a legitimate business and not in violation of any law or statute; that the business of the complainant would be irreparably injured unless an injunction issued. The master recommended the issuance of an injunction restraining the defendants from entering the premises or interfering with the business of the complainant, except in the manner provided by law. The exceptions to the master's report were overruled by the chancellor and a decree entered in conformity with his recommendations. This decree provided for the issuance of the injunction, restraining defendants from molesting or interfering with complainant, except upon warrant or other legal process issued by a court of competent jurisdiction.

tubs, electric cabinets, radio [illegible], [illegible] or treatment tables, etc.; that it [illegible] on the business she had had special [illegible] the [illegible] of the establishment; that she had [illegible] $3,000 [illegible] for the equipment and that she derived from [illegible] month net profit from the business; that on [illegible] officers of the law entered the premises without [illegible] through the premises and asked [illegible] that they later entered the premises on several occasions and at times there were as many as six or seven [illegible] present working in uproar and threatening to close [illegible] premises.

The complainant testified that, as a result of these actions, numerous patrons had refused to patronize her, that she had no adequate remedy at law, and that her business would be destroyed if the action of the police continued. She testified further that there were never any disturbances in the premises and that [illegible] time, without any warrant, they took her and her employees to the Central Station; that after a hearing she was discharged.

The cause was referred by the [illegible] to a master in chancery who took the testimony and [illegible] on his findings. The master found that the business of the complainant was a legitimate business and not in violation of any law or statute; that the actions of the complainant could be interpreted [illegible] to indecent [illegible] issued. The master recommended the issuance of an injunction restraining the defendants from entering the premises of the complainant with the business of the complainant, except in the regular pursuit of her [illegible]. The exceptions to the master's report were overruled by the chancellor and a decree entered in conformity with his recommendations. This decree provided for the issuance of the injunction, restraining defendants from molesting or interfering with complainant, except upon warrant or other legal process issued by a court of competent [illegible]

It is insisted on behalf of the defendants that an officer has a right to arrest when he has reasonable grounds for believing that the person arrested is implicated in a crime. This rule is correct, except that it does not apply in the instant case. It is also urged that a police officer has the right to enter a public place or house. This rule is also correct, but there is no evidence that this is a public place within the meaning of that word. It does not appear that there is any ordinance licensing such places nor does it come within the classification of hotels, public buildings, theatres or other such public places.

It is also urged that a court of equity is not concerned with the enforcement of the police power, nor has it authority to direct or control police officers charged with the enforcement of the law. This is also a correct rule with the exception that they must, at the time, be acting in conformity with the law. We are cited to the rule as laid down in 14 R. C. L, section 68, page 367, to the effect that a court of equity will refuse an injunction where its purpose is to prevent police interference directed against the conduct of an unlawful business, particularly where the injured person has a remedy at law. We find, however, that this rule cites as authority, the case also cited by counsel for defendant, Delaney v. Flood, 183 N. Y. 323. That decision, however, has been expressly disaffirmed by the Supreme Court of New York, Appellate Division, in the case of Hagan v. M'Adoo, 113 App. Div. N. Y. 506, also found in 99 N. Y. Supp. 355. The facts in that case as set out by the court in its opinion follows:

> "The material facts in this case are not in dispute. The plaintiff is engaged in business in Manhattan borough as a dealer in notions. He occupies the second floor as lessee and there is a liquor saloon on the first. The complainant alleges a continuous malicious and oppressive trespass by the defendants, who are the police commissioner and two police captains of the city of New York, upon his said premises, and interruption

It is [illegible] that [illegible] an officer has a right to arrest [illegible] for believing that the person [illegible] in [illegible]. This rule is correct, except [illegible] in the instant case. It is also urged that [illegible] public place or house. This rule is also correct, but there is no evidence that this is a public place or [illegible] of that sort. It does not appear that there is any audience [illegible] nor does it come within the [illegible] theatres or other such public places.

It is also urged [illegible] is not concerned with the enforcement of the [illegible] to direct or control police [illegible] the enforcement of the law. This is also a correct rule [illegible] they must, at the time, be acting in conformity with the law. [illegible] to the rule as laid down in [illegible] 527, to the effect that a court of equity [illegible] its purpose is to prevent acts [illegible] of an unlawful business, particularly [illegible] a remedy at law. We find, however, that this rule [illegible] the case also cited by counsel for [illegible], [illegible] v. Flynn, 179 N. Y. 322. That decision, however, has been overruled [illegible] by the Supreme Court of New York, Appellate Division, in the case of Hagen v. Wilson, 112 App. Div. [illegible] N. Y. Supp. 1066. The facts in that case [illegible] out by the court in the opinion follows:

> "The material facts in this case are not in dispute. The plaintiff is engaged in business in a small [illegible] as dealer in pictures. He occupies the second floor [illegible] and there is a floor above on the first. The complainant alleges a continuous solicitation and [illegible] by the defendants, who are the police commissioner [illegible] of the city of New York, [illegible] the interruption

of his said business, and irreparable damage therefrom, for which an action for damages would not be an adequate remedy. From day to day for about five weeks prior to the commencement of this action policemen visited the premises of the plaintiff, entered it against his objection, loitered there, searched it, and frequently said in the presence and hearing of customers there purchasing goods that they suspected the place was a pool room. They had no warrant and made no arrest. Customers left the premises because of such police interference, and the plaintiff's business steadily fell off. The policemen also often stood on the stairway and turned back customers going to the plaintiff's place. These things were done under the orders of the two police captains who are defendants, and they refused to stop them on the demand of the plaintiff."

The facts as above set forth are so similar and analogous to the case at bar, that we have quoted them rather fully. The court in its opinion based upon those facts, says:

"If private persons were committing these trespasses an injunction would be issued as a matter of course during the pendency of the action to stop them, instead of leaving the plaintiff to be ruined by them before the action could be tried. There is a distinct head of equity for the protection of persons against continuous trespasses. Does it make a difference that the unlawful trespassers are police officials? May they unlawfully destroy a man's house or property, while courts of equity look on and say they have no jurisdiction or power to stop them? I know of no such difference, and none is stated in any judicial decision or text-book, unless in the very recent case of Delaney v. Flood. The trite rule that a court of equity will not interpose to prevent arrests, or the administration of the criminal law, is, as it has always been, undisputed by bench or bar. But it has no application to a case like this. No arrests were made or attempted, nor were the defendants engaged in any way in the administration or enforcement of the criminal law. The ways, methods, and procedure for the administration and enforcement of the criminal law are carefully prescribed and limited by law, and when the police go outside of them, and violate the rights of property, person, or home of the individual, they are not engaged in administering and enforcing the criminal law, but are common trespassers and lawbreakers. If the civil courts will not prevent such trespassers, then the police are let loose on the community to commit extortion right and left, a condition only too well known among us in the recent past as attested by the public records of the state. I do not understand Delaney v. Flood as conferring such unrestrained power or such immunity on constables and policemen. It would be altogether too much to believe that the Court of Appeals meant to do so. We are not bound to understand that every word or sentence in a judicial opinion is to be taken as law. The suggestions pressed upon us that a plaintiff who comes into a court of equity to seek to save his property and business from destruction by continuous criminal trespass may be dismissed thence on the ground that a criminal prosecution or

[illegible]

analogous to the case [illegible]

The court in its o[illegible]

"If rights guaranteed [illegible] be disregarded, the injunction would be issued as a matter of course during the pendency of the motion to dismiss, instead of leaving the plaintiff to be relieved by the [illegible] which would be taken. There is a distinction [illegible] the protection of persons against [illegible] does it make a difference if the officers are police officials, may they [illegible] house or property, while [illegible] they have no jurisdiction or power to [illegible] no such difference, and none is [illegible] doctrine of tort-doer, unless in the very recent case of Delaney v. Flint. But this rule [illegible] will not subscribe to [illegible] tion of the criminal law, [illegible] posed by denial on [illegible] like this. No [illegible] defendants engaged in any way in the [illegible] ment of the criminal law. The [illegible] for the administration and enforcement of the criminal law, [illegible] are certainly recognized and [illegible] police go outside of them. No [illegible] person, or house of the individual. [illegible] administering the enforcing the criminal law, but to common trespassers and [illegible]. In the civil courts will not prevent such trespassers. If the police [illegible] the community to [illegible] only too well known [illegible] by the police [illegible] Delaney v. Flint [illegible] such immunity on [illegible] together too much to [illegible] to do so. We are not [illegible] sentence in a judicial opinion [illegible] ang,aitions reason o on [illegible] a court of equity to [illegible] from destruction by [illegible] [illegible]

conviction of the trespassers will give him adequate redress for the loss of his property and the destruction of his business meanwhile has no foundation in principle or in any actual decision. Only the state, the community at large, gets redress by a criminal prosecution. That thief or trespasser may be arrested or convicted does not restore the property he has stolen or destroyed."

Complainant's bill and the evidence in support of it shows facts which constitute a continuing trespass, and which, if allowed to continue, would result in a complete loss of the business and the money investment of the complainant. It is clear that the injury resulting would be irreparable. There is nothing inherently wrong in the conducting of a massage and bath establishment. It is a well recognized business and while not as much in vogue in this country as in others, nevertheless, it is entitled to the full protection of the law if conducted along proper and legal lines. If it should be conducted as a cloak for some other and different purpose, which is not countenanced by the law, it can be suppressed in a proper manner and under proper processes issued by courts of competent jurisdiction.

If the police department is of the opinion that such an establishment is used as a house of prostitution and not for the purpose of a massage and bath institution, a warrant could be obtained, properly sworn to, based upon the reasonable belief of the informant, which would entitle the police department to enter the premises for the purpose of establishing the fact that it was run for an immoral or improper purpose and contrary to the statutes of the State of Illinois. The State could also proceed under the statute to abate the nuisance if it should be found to be such.

One Burns, a police officer, testifying on behalf of the defendant, stated that when he entered the establishment he found a girl, and a man by the name of Zimmerman, in the act of having sexual intercourse and that, thereupon, all those on the premises of the plaintiff were placed under arrest. This evidence was before

conviction of the trespasser will give [illegible] for the loss of his property and the obstruction of [illegible] business necessitate his [illegible] or [illegible] mutual destruction. Only the state, the community [illegible] gets redress by criminal prosecution. Just what [illegible] trespasser may be arrested or committed upon [illegible] the property be his stolen or destroyed.

Complainants [illegible] shown facts which constitute [illegible] allowed to continue, would [illegible] and the money investment of [illegible] injury resulting would be irreparable. [illegible] wrong in the conducting of a [illegible] a well recognized business and which not [illegible] country as in other, nevertheless, it is contrary [illegible] protection of the law if conducted [illegible] it should be conducted in a place for such [illegible] which is not countenanced by the law, it [illegible] proper manner and under proper [illegible] competent jurisdiction.

If the police department [illegible] an establishment is used as a house of prostitution [illegible] purpose of a massage and bath institution, [illegible] property owner to, based upon the [illegible] which would entitle the police department [illegible] the purpose of establishing the fact that it is [illegible] or improper purpose and contrary to [illegible] Illinois. The state could also proceed [illegible] the nuisance if it should be found to [illegible].

The [illegible], a police officer, [illegible] the defendant, stated that when he entered the establishment he found a girl, and a man by the name of [illegible] the act of having sexual intercourse and that, therefore, all those on the premises of the [illegible] were placed under [illegible]. This evidence was [illegible]

the master at the time he made his report and it was also before the chancellor at the time he approved the report. It may be that they were not impressed with this testimony or did not believe it. Even though it were true, it could not be used in this proceeding and could have been suppressed.

In the recent case of The People v. McGurn, 341 Ill.632, it appears from the facts that Jack McGurn was arrested by a police officer under a general order to arrest McGurn on sight. The officer had no warrant. A gun was found upon McGurn's person, however, concealed underneath his coat. He was charged with carrying concealed weapons, contrary to the statutes of the State of Illinois. The Supreme Court in its opinion, says:

> "* * 'The essence of a provision forbidding the acquisition of evidence in a certain way is, that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed.'
>
> While the police officers testified that at the time of plaintiff in error's arrest, search and seizure of the revolver he had the revolver concealed upon his person, the only knowledge which they had upon the subject was that derived as the result of their unlawful search and seizure. This evidence was therefore incompetent."

In the present case, this testimony was acquired by reason of an unwarranted search and seizure of the premises of the complainant, and the city authorities under the decision cited, could not have sustained a conviction on the testimony acquired in such a manner. People v. McGurn, 341 Ill. 632. The chancellor having found as a matter of fact that the business of the complainant was a legitimate business and not in violation of any law, and this finding having sufficient support in the evidence adduced upon the hearing, it should receive the affirmance of this court unless contrary to the weight of the evidence.

the master at the [illegible] office [illegible] observation as the time he supposed the [illegible] were not learned [illegible] this testimony [illegible] though it were true, it could not [illegible] could have been no [illegible].

In the recent case of *The [illegible]*, [illegible] it appears from the facts that [illegible] officer under a [illegible] officer had no [illegible] concealed underneath his [illegible] weapons, contrary to the [illegible] Supreme Court in its opinion, says:

> "'[illegible] consent of a [illegible] 'establishes the admissibility of evidence in a criminal [illegible], but not merely evidence so secured shall not be [illegible] that it shall not be used at all. Of course, [illegible] mean that the facts thus obtained become sacred [illegible] source they may be proved like any other, [illegible] gained by the government's own wrong can not be used [illegible] the way proposed.'
>
> While the police officers testified that [illegible] time of plaintiff's arrest, [illegible] revolver be her's revolver concealed on his person, the only knowledge which they had upon the subject was [illegible] derived as the result of their unlawful search. [illegible] This evidence was therefore inadmissible."

In the present case, the evidence was admitted [illegible] reason of an unreasonable search and seizure [illegible] plaintiff, and the city authorities [illegible] have sustained a conviction on the testimony [illegible] *Gorgie v. Commw.*, 241 Pa. 1[illegible]. The disposition [illegible] matter of fact that the business of the [illegible] business was not in violation of any law, [illegible] sufficient evidence [illegible] receive the affirmance of this court [illegible] weight of the evidence.

We see no reason for disturbing the decree and for that reason the decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

34994

INDEPENDENT ACCEPTANCE COMPANY, a Corporation, Assignee of E. H. ROBINSON MOTOR SALES, INC., a corporation,

(Plaintiff) Appellee,

v.

JOSEPH N. ROBERTS, GEORGE BENEDEK and MARY BENEDEK,

(Defendants) Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

263 I.A. 341

Opinion filed October 21, 1931

MR. JUSTICE WILSON delivered the opinion of the court.

The Independent Acceptance Company, as assignee of the E. H. Robinson Motor Sales, Inc., obtained judgment by confession on a certain chattel mortgage note in the Municipal Court of Chicago June 11, 1930, against Joseph N. Roberts, George Benedek and Mary Benedek. The judgment was for the sum of $1,153.00, which included attorney's fees. Motion to vacate the judgment was made November 25, 1930, over five months after the confession of judgment. Affidavits were filed in support of the motion to vacate the judgment setting forth that the defendants had no knowledge of the judgment until the 24th of October, 1930, at which time they requested their attorney to examine the records of the Municipal Court for the purpose of ascertaining whether a judgment had been taken against them. The affidavit also contained the facts upon which defendants relied as a defense to the action. This defense apparently consisted of allegations to the effect that the defendants could not read and did not understand the instrument which they were signing. Counter-affidavits were introduced on the part of the plaintiff for the purpose of showing that the defendants had knowledge of the fact of the entry of the judgmnet, on or before July 12, 1930.

The record discloses that on July 12, 1930, a letter

INDEXNUMBER: [illegible]
a Corporation, [illegible]
Z. M. Mahoney [illegible],
ISO, a corporation,

(Intervenor [illegible]),

v.

JOSEPH M. [illegible],
and MARY [illegible],

(Defendants) [illegible].

Opinion filed October 21, 1921

[illegible]

The Interpleader [illegible]

of the [illegible] Robinson [illegible]
condemnation on a certain [illegible]
of Chicago June [illegible], [illegible]
and Mary Lendon. The [illegible]
included attorney's fees. [illegible]
November 25, 1920, [illegible]
affidavits were filed in [illegible]
setting forth that the [illegible]
until the 24th of October, [illegible]
attorney to examine the [illegible]
of ascertaining whether a judgment [illegible]
The affidavit also [illegible]
as a defense to the action. [illegible]
allegations by the attorney [illegible]
did not understand the [illegible]
affidavits were insufficient [illegible]
purpose of moving to set the [illegible]
of the entry of the judgment, or [illegible]

The record discloses [illegible]

was mailed to the defendant George Benedek, the person subscribing to the affidavit on behalf of the defendants, in which Benedek was advised of the fact that a judgment by confession had been taken against him and against Mrs. Benedek, his wife. Several other affidavits were filed by persons connected with the plaintiff corporation, from which it appears that prior to July 12, 1930, the defendants had been notified by telephone of the judgment and they had appeared several times in the office of the plaintiff corporation and were there advised about the judgment and the fact that they would be called upon to pay it.

After a full hearing the trial court refused to vacate the judgment. A motion in arrest of judgment was made and overruled and this appeal prayed and allowed.

It is insisted that the court erred in permitting the filing of counter-affidavits and in considering them on the motion to vacate the judgment. This position would be correct if the affidavits were considered by the court on the question of the merits of the controversy. It is proper, however, for the court to consider affidavits and testimony on the motion to vacate a judgment when the affidavits or testimony bear solely on the question as to whether or not the motion to vacate was presented within a reasonable time after the defendants had knowledge of the judgment. Mutual Insurance Co. v. Carnahan, 122 Ill. App. 540; Finkelstein v. Schilling, 135 Ill. App. 543.

A motion to vacate a judgment is addressed to the sound discretion of the court and where it appears that a defendant had knowledge of the judgment and slept on his rights, the trial court, within its discretion, may deny the motion to vacate. Freeman v. Counsell, 203 Ill. App. 333. This court will not reverse unless it appears that there has been an abuse of that discretion.

was called to the attention of the lower court, [illegible] to the affidavit on behalf of the defendants, in which counsel advised of the [illegible] against him and against the [illegible] affidavits were filed on [illegible] corporation, from which [illegible] defendants had been notified by [illegible] had a period several times in [illegible] and were there advised that [illegible] would be called upon to pay it.

[illegible] the judgment. A motion in arrest of judgment [illegible] and this court proper may allege.

It is insisted that the court erred in striking the filing of counter-affidavits and in overruling the motion to vacate the judgment. The question [illegible] if the affidavits were considered by the court [illegible] merits of the controversy. It is [illegible] to consider affidavits and testimony [illegible] when the affidavits or testimony [illegible] to whether or not the motion to [illegible] time after the defendants had knowledge of the [illegible] Insurance Co. v. Wheeler, [illegible] 128 Ill. App. 343.

A motion to vacate a judgment is addressed to the sound discretion of the court and there is [illegible] had knowledge of the judgment and slept [illegible] within the discretion, any party the motion to [illegible] Lessman v. Donnell, 108 Ill. [illegible] court did not err when it appears that there has been a [illegible] of [illegible] action.

From the facts in this case, we are of the opinion that the defendants did not show such diligence as the law requires, and the court, acting properly within its discretion, denied the motion to vacate the judgment.

It is also insisted that the action was against three defendants and the judgment against but one, and that, therefore, it is impossible to tell which of the three defendants is the one against whom the judgment runs. An examination of the record, however, discloses that the judgment order entered in the cause runs against the defendants (plural), and names them individually as defendants. Defendants objection is evidently based upon a reading of the memorandum signed by the trial judge. The final judgment order, however, from which this appeal is taken, is correct in that it is a judgment against all of the defendants and this final judgment order, as spread of record, is presumed to be a judgment of the court. Phelps v. Hunter, 195 Ill. App. 181; Cronk v. Gieseke, 315 Ill. 417.

We see no reason for disturbing the judgment and for the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

[illegible]

that the defendants [illegible]
and the court, [illegible]
motion to [illegible]

It is [illegible]
these defend[illegible]
therefore, [illegible]
is the one [illegible]
record, however, [illegible]
the cause [illegible]
individually [illegible]
based upon [illegible]
the final judgment [illegible]
is correct in [illegible]
and this final judgment [illegible]
to be a judgment of [illegible]
181; Long v. Adams, [illegible]

[illegible]
for the reasons [illegible]
Municipal Court is affirmed.

[illegible]

35618

CHICAGO TITLE & TRUST COMPANY, a Corporation, as Trustee, Appellee,

vs.

ETHEL LEVY et al., Appellants.

INTERLOCUTORY APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendants appeal from an interlocutory order appointing a receiver in a foreclosure proceeding.

The first point made is that the bill of complaint is not properly verified. The verification says that the affiant has read the bill of complaint and knows the contents, "and that the same is true to his best knowledge." This is not the form which has been criticized in the cases cited by defendants. The bill was properly verified.

The bill was filed by complainant as trustee for the benefit of the owners and holders of the notes secured by the trust deed. Defendants say that these owners of the notes were the proper parties to bring the suit. In American Trust & Safe Deposit Co. v. 180 East Delaware Bldg. Corp., 262 Ill. App. 67, it was held that, as the provisions of the trust deed gave the right to the trustee to file a bill to foreclose, the bill was properly filed, citing a large number of cases so holding. In the instant case the trust deed gives the complainant the right to commence foreclosure proceedings "for the benefit of the holder or holders of said notes." Martin v. Frank, 259 Ill. App. 417, cited by defendants, is not contrary to this rule. There, an individual other than the trustee filed a bill to foreclose and the controversy involved the question as to whether he was a holder of any

CHICAGO [illegible]
a Corporation, [illegible]
Appellee.

"v.

ETHEL LEVY et al.,
Appellants.

MR. JUSTICE [illegible]

[illegible]

holding a receiver in a [illegible] tion.

[illegible]

not properly verified. [illegible]
has read the bill of complaint [illegible] the allegations, and that
the same is true to his own [illegible] knowledge." [illegible] which has been notarized by the [illegible] notary. The
bill was properly verified.

The bill was [illegible]
benefit of the owners of [illegible] by the
trust deed. Defendants in [illegible]
proper parties to bring the [illegible] In A. [illegible] v. [illegible]
Co. v. [illegible] [illegible]
that, as the provisions of [illegible]
trustee to file a bill to [illegible]
citing a large number of [illegible]
the trust deed [illegible]
clause proceeding [illegible]
said notes." [illegible]
Fendants, is not [illegible]
other that the [illegible]
very involved [illegible]

part of the indebtedness. It was held that neither by the allegations of the bill nor by any testimony was it shown that he was the beneficial owner or had any authority from the owners to file the bill.

It is suggested in argument that defendants had made an agreement with The Prudence Company, Inc., the legal holder of the note and trust deed, that no action would be taken to foreclose until the maturity of the indebtedness, provided the defendants would surrender possession of the premises together with the rents to The Prudence Company; that pursuant to such agreement possession was surrendered and therefore the institution of the foreclosure suit was a violation by the legal holder of its agreement. Defendants' answer alleges a verbal agreement to this effect, which was incorporated in a writing set forth in full. Nowhere in this writing is there any covenant or agreement that The Prudence Company should not foreclose the trust deed until the maturity of the indebtedness. In any event, this is a matter of defense to be presented upon the hearing on the merits. It is not material upon the present appeal which involves merely the question as to whether upon the showing made the receiver was properly appointed.

It does not seem to be controverted that facts appeared which warranted the appointment of a receiver, and the order will therefore be affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

part of the indebtedness. It [illegible] on [illegible] gations of the risk not by any [illegible] was the beneficial owner [illegible] for the number of file the [illegible].

It is argued [illegible] an agreement with the [illegible], and [illegible] of the [illegible] close until the [illegible] auto would authorize possession of [illegible] rants to the [illegible] possession was [illegible] forecloseure suit was a violation [illegible] agreement. [illegible] effect, which was [illegible] Bowmore to [illegible] The [illegible] the maturity of the [illegible] of defense to be presented [illegible] not material when the [illegible] question as to whether [illegible] properly [illegible].

It does not [illegible] [illegible] secured which warranted [illegible] order will therefore be affirmed.

[illegible]

O'Connor, [illegible]

35063

JAMES H. HOOPER,
Plaintiff in Error,

vs.

W. W. KLIPPER,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

263 I.A. 642

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

This suit is brought by plaintiff against defendant to recover $200 as rent claimed to be due plaintiff as the owner of certain real estate at the corner of Kenmore and Hollywood avenues, Chicago. Plaintiff bases his title to the property by virtue of a sale under a judgment rendered in the Municipal court. On January 6, 1931, there was a trial by the court without a jury and a finding and judgment in plaintiff's favor for $200. February 20, 1931, the court entered an order sustaining defendant's motion and vacated the judgment, and plaintiff has sued out this writ of error.

Defendant, in support of his motion to vacate the judgment, filed a verified petition in which he set up that he knew nothing about the proceeding against him until he was served with an execution; that he was never served with summons and that his written appearance, filed by an attorney in the case, was without authority; that he had no knowledge that such appearance had been filed. The petition then sets up the judgment of the Municipal court by virtue of which the property was purported to have been sold to plaintiff; and the defendant neither admitted nor denied such Municipal court proceedings or the call for strict proof. It then set up that Celle Becker was the owner of the property and that defendant occupied the premises under a lease from Becker and paid her rent therefor.

JAMES E. [illegible],
Plaintiff in error,

vs.

[illegible],
Defendant in error.

[illegible]

[illegible]
DELIVERED [illegible]

[illegible]

to recover [illegible] of certain [illegible] avenues, [illegible]. Plaintiff [illegible] virtue of a [illegible] On January 2, 1931, [illegible] and a [illegible] May 20, 1931, the [illegible] motion and [illegible] with of error.

Defendant in [illegible] judgment, filed a [illegible] nothing about the [illegible] in such [illegible] in [illegible] orities [illegible] authority; that [illegible] filed. [illegible] court by [illegible] not to [illegible] such [illegible] that [illegible] that [illegible] and [illegible]

We think that the court was entirely warranted, under the circumstances disclosed by defendant's petition, in setting aside the judgment and giving defendant leave to defend. Moreover, we are this day filing an opinion in Hooper v. Cohen, No. 35198, which involves the same property, and for the reasons therein stated the action of the Municipal court is entirely justified. It having been judicially determined that plaintiff had no title to the property in question, obviously he cannot maintain a suit for rent.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

We notice that the court was evidently convinced, under the circumstances disclosed by defendant's petition, it should make the judgment and giving defendant leave to defend. However, we are this day filing an opinion in ADAMS V. ADAMS, No. 28824, which involves the same property, but for the reason stated under the action of the municipal court is entirely justified. It having been judicially determined that plaintiff has no title to the property in question, obviously he cannot maintain a suit for rent.

The judgment of the Municipal Court of Kansas City is affirmed.

AFFIRMED.

Moderwell and Kennedy, J.J., concur.

35198

JAMES S. HOOPER,
Plaintiff in Error,

vs.

MAX COHEN,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

66

263 I.A. 342

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

May 2, 1928, plaintiff commenced an action in the Municipal court against defendant to recover $250, plaintiff's contention being that he was the owner of certain premises at the corner of Kenmore and Hollywood avenues, Chicago, that the defendant occupied one of the apartments as a tenant and was therefore liable for rent. The case was pending in the courts until March 9, 1931, when there was a hearing before the court without a jury, a finding and judgment against plaintiff, and he appeals.

Plaintiff set up in his statement of claim that he became the owner of the premises by virtue of the sale by the bailiff of the Municipal court; that in February, 1926, the Broadway-Sheridan Building Corporation recovered a judgment in the Municipal court of Chicago against Celle Becker, the owner of the apartment building, for $725, and that there was a sale by the bailiff of that court ; that by virtue of such sale plaintiff became the owner of the premises; that the defendant was a tenant occupying one of the apartments and was notified by plaintiff to thereafter pay the rent to him.

The defendant filed an affidavit of merits, which need not be mentioned here because on the trial of the case he filed an amended affidavit of merits in which he set up, among other things, that it had been adjudicated by the Municipal court

38198

JAMES S. MOSHER,
Plaintiff in Error,

vs.

MAX COHEN,
Defendant in Error.

Mr. PRESIDING JUSTICE CLARK delivered the opinion of the court.

May 3, 1926, plaintiff in error recovered a judgment in the Municipal court against defendant in error, [illegible] in the contention being that he was the owner of certain premises at the corner of Kimbark and [illegible] avenues, Chicago, and that the defendant occupied [illegible] and was therefore liable for rent. [illegible] in the courts until March 9, 1927, when [illegible] before the court without a jury, a finding and [illegible] judgment [illegible] appeals.

Plaintiff set up in his [illegible] that he became the owner of the premises by virtue of [illegible] by the bailiff of the Municipal court [illegible] January, 1926, the Broadway-Shorelan Building Corporation [illegible] in the Municipal court of Chicago [illegible] the contract [illegible] the bailiff of that court [illegible] became the owner [illegible] occupying one of the [illegible] thereafter [illegible].

The [illegible] need not be [illegible] filed on behalf [illegible] other [illegible]

of Chicago in a suit brought by plaintiff and the bailiff of the Municipal court against Celle Becker and the American Surety Company, that Hooper's deed to the property in question was void; that this judgment had been affirmed by the Appellate court of this district, general number 33347 (254 Ill. App. 606). Other matters are set up in the amended affidavit of merits which we think it unnecessary to mention here. It further appears that Hooper filed a petition for a writ of certiorari in the Supreme court, seeking to reverse the judgment of this court, (254 Ill. App. 606) and that the petition was denied by the Supreme court at the October term 1929, the docket number in the Supreme court being 19823 (Hooper v. Becker, 256 Ill. App. XLV.) Another opinion was filed by this court October 9, 1931, in the case of Celle Becker v. James H. Hooper, No. 34897, which gives a history of a great deal of litigation brought by Hooper affecting this same property. On the trial of the case, when it was made to appear that this court had held Hooper's title to the property void, as above stated, the only answer to this proposition made by Hooper was that the Supreme court in the case of Celle Becker v. James H. Hooper, 340 Ill. 98, which he contends affirmed his title to the premises, was a later decision and therefore controlling. This is an ingenious argument but wholly without merit. The case in 340 Ill. 98, is numbered on the docket of the Supreme court 18949. The opinion in that case was not filed until June 20, 1930, which was nearly nine months after the Supreme court had denied certiorari as above mentioned. The case in which the certiorari was denied was filed in the Supreme court several months later than the one reported in 340 Ill. Moreover, the opinion in 340 Ill. was based upon a technicality - the certificate of evidence having in that case been stricken, the decree of the trial court was affirmed because assignments of error were based upon

of Chicago in a suit for [illegible] of the municipal court [illegible]. In Ameris v. Chicago Company, that court's [illegible] to the proposed [illegible] was held; that this judgment was [illegible] by the municipal court of this district, general number [illegible] (34 Ill. App. [illegible]). Other matters are set up in the amended [illegible] but we think it unnecessary to mention them. It [illegible] that Hooper filed a petition for a writ of certiorari in the superior court, seeking to review the judgment of this court, (Ill. App. 306) and that the petition was [illegible] at the October term 1908, the [illegible] number in the [illegible] being 19633 (Hooper v. [illegible], [illegible] App. [illegible]). [illegible] opinion was filed by this court [illegible], in the case of [illegible] v. James F. Hooper, [illegible] of Illinois [illegible] trial of the case, [illegible] held Hooper's title to [illegible], the only answer to this proposition [illegible] in the case of [illegible] v. [illegible], [illegible] he contends [illegible] and therefore [illegible] without merit. The case in 240 Ill. 89, is inapposite to the facts of the superior court [illegible]. The opinion in that case was not filed until June 20, 1908, [illegible] court had jurisdiction [illegible]. The case in which the certiorari was [illegible] in the [illegible] court several months later [illegible] opinion in [illegible] Ill. [illegible]. However, the opinion in 33 Ill. 133, has [illegible] upon a technicality - the certificate of evidence [illegible] from other [illegible] of the trial court was affirmed because [illegible] of error were [illegible]

the evidence. It having been adjudicated that plaintiff's claimed title to the property in question was void, it is obvious that his endeavor to collect rent from the tenant in the building is without the semblance of merit.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

the evidence. [illegible]

[illegible]

his opinion. [illegible]

without the evidence of [illegible]

[illegible]

affirmed.

[illegible]

[illegible]

35266

SOUTH BEND LATHE WORKS,
a Corporation,
Appellee,

vs.

ARCHIMEDE SYNDICATE, ALFREDO CAPITININI, FRED BALDINI and GEORGE VENNEMAN, Trustees,
Appellants.

67 A

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

263 I.A. 542

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

January 30, 1931, plaintiff brought an action of replevin to recover the possession of a small turning lathe. The lathe was taken on the writ by the bailiff and delivered to the plaintiff. Afterwards there was a trial before the court without a jury, and a finding that the right of possession of the property was in plaintiff; its damages were assessed at the sum of one cent; judgment was entered on the finding and defendants appeal.

The record discloses that on August 4, 1930, the defendants gave a written order for a turning lathe to C. B. Burns Machinery Company of Chicago. The order is apparently a blank form of order of the plaintiff, the South Bend Lathe Works, and requests the Burns Machinery Co. to ship f. o. b. South Bend, Indiana, the turning lathe, for which the defendants agreed to pay $105.49, $15.07 of which was paid in cash and the balance of $90.42 payable in equal monthly installments "beginning one month after shipment is made." The order states it is placed subject to all the terms and conditions printed on the back of the order. The printed conditions are that the title to the property "shall remain in the seller until all of the stipulated payments *** are made.

"This agreement may be assigned or the property removed from within address only with the permission of the seller. If the payments specified are not made when due (reasonable

38800

SOUTH BEND [illegible] WORKS,
a Corporation,
Appellee,

vs.

ARCHIMEDES STILLSATE, ALFRED
CAPITELLOS, [illegible] and
GEORGE VAN [illegible], Trustees,
Appellants.

[illegible]
[illegible]
[illegible]

[illegible]
[illegible]
[illegible]

January 3, 1931, plaintiff brought an action of replevin to recover the possession of [illegible] lathe. The lathe was taken on the writ by the sheriff and delivered to the plaintiff. Afterwards there was a trial [illegible] without a jury, and a finding that the [illegible] of the property was in plaintiff; the damages [illegible] at the sum of one cent; judgment was entered on the finding [illegible].

The record discloses that on August 4, 1930, the defendants gave a written order for a [illegible] lathe to [illegible] Machinery Company of Chicago. [illegible] in consideration a blank form of order of the plaintiff, the [illegible] "Sold, and requests the [illegible] to ship [illegible], the [illegible], the [illegible] $15,07 of which was paid [illegible] in equal monthly installments [illegible] is made." The order [illegible] the terms and conditions printed on the [illegible] stipulations are that the title to the property "[illegible] seller until all of the stipulated [illegible] moved from [illegible] in question [illegible] if the payments [illegible]

allowance being made in case of illness), the seller may declare all remaining payments due and payable, whereupon the buyer, upon demand, will pay such entire balance or voluntarily return the property to the seller forthwith, forfeiting all payments previously made as rent for the use of the property and damages for non-fulfillment of this agreement, or, failing to do so, assume such expense as may be incurred by the seller in securing performance of this agreement." Then follows: "ACCEPTANCE AND ASSIGNMENT

"THE UNDERSIGNED hereby accepts the contract on the reverse side hereof, and, for value received, sells, assigns and transfers to SOUTH BEND LATHE WORKS *** all right, title and interest in and to the said contract and the property described therein, guaranteeing the full performance of all its terms and the prompt payment of all sums provided therein, with *** attorney's fees." This is signed by the Burns Machinery Co. and is dated June, 1930, although the order is dated August 4, 1930.

It appears from the evidence that the Burns Machinery Co. sells turning lathes for the South Bend Lathe Works, which manufactured the lathe in question; that defendants made all the monthly payments provided for in the contract, except three which fell due November 28, December 28, 1930, and January 28,1931, each for $15.07.

The evidence further shows that on January 6, January 16, and January 23, 1931, defendants sent to plaintiff a money order for $15.07, and that upon receipt of each of these money orders by plaintiff at South Bend, Indiana, it was returned to the defendants, the return dates being January 14, January 18, and January 24, 1931. The reason for the drafts being returned is stated in letters written by plaintiff to defendants to the effect that plaintiff had turned over the account to its attorney and

allowance being made in case it ripens, the [illegible] creditor all remaining payments due and payable, whereupon the buyer, upon demand, will pay such entire balance or unhesitatingly return the property to the seller forthwith, [illegible] aforementioned. [illegible] made as rent for the use [illegible] for non-fulfillment of this agreement, or, failing to do so, assume such expense as may be incurred by the seller in enforcing [illegible] of this agreement." Then follows: "ADDITIONAL [illegible]

"THE UNDERSIGNED hereby accepts the contract on the reverse side hereof, and, for value received, hereby, jointly and severally to wit: [illegible] and [illegible], [illegible] and interest in and to the said contract, and the property described therein, guaranteeing the full performance of all the terms and the prompt payment of all sums provided thereby, [illegible] attorney's fees." This is signed by the Lorna Sanitary Co. and is dated June, 1930, although the order is titled no, and is dated [illegible].

It appears from the evidence that the Lorna Sanitary Co. sells burning liquids for hot water heater, which manufactured the liquid in question; that defendants made all the monthly payments provided for in the contract, except three which fell due November 28, December [illegible], 1, and January 28, 1931, each for $18.00.

The evidence tends to show [illegible] January 16, and January 23, 1931, [illegible] order for $18.97, and that upon receipt of each of these money orders by plaintiff at South [illegible], [illegible] the defendants, the return [illegible] January [illegible], January 24, 1931. The reason for [illegible] stated in letters written by plaintiff to defendants to the effect that plaintiff had turned over the accounts to its attorney and

that defendants should take the matter up with plaintiff's Chicago attorney. In plaintiff's last letter plaintiff stated that defendants might be able to arrange a settlement "by paying the balance due plus our attorney's fees and expenses as provided by our contract." Six days after the plaintiff had returned the last money order to the defendants it commenced the present replevin action.

One of the conditions on the back of the written order and which we have above quoted, was that if the monthly payments were not made when due, the seller (Burns Machinery Co.) might declare all of the remaining installments due and payable, whereupon the buyer (the defendants) agreed to pay the entire balance or return the property to the seller. There is no evidence that the seller or its assignee made any demand for all of the remaining payments but demanded only the payments which were overdue, namely, the payments due in November and December. According to this condition, before defendants' rights could be terminated, the seller must declare all the remaining payments due and in case the balance were not paid, the defendantswould be required, under the conditions, to voluntarily return the property to the seller, or, failing to do so, be liable for expenses the seller might incur. Neither the seller nor its assignee, the plaintiff, complied with the terms of this condition, and therefore plaintiff had no right to take possession of the property.

Moreover, under the law, it is usually necessary for plaintiff, before bringing an action of replevin, to demand possession of the property where the defendant comes into possession of it rightfully, but this demand is not necessary where it appears that a demand would have been unavailing. Kee & Chapell Co. v. Penn. Co., 291 Ill. 248; Nat'l Bond & Investment Co. v. Zakos, 230 Ill. App. 608; Chicago R. I. & Pac. R. Co. v. North Amer.C.S. Co.

that defendants should take the matter up with plaintiff's Chicago attorney. In plaintiff's last letter plaintiff stated that defendants might be able to arrange a settlement "by paying the balance due plus our attorney's fees and expenses as provided by our contract." Six days after the plaintiff had returned the last money order to the defendants it commenced the present instant action.

One of the conditions on the back of the written order and which we have above quoted, was that if the monthly payments were not made when due, the seller (Guaranty Security Co.) might declare all of the remaining installments due and payable, whereupon the buyer (the defendants) agreed to pay the entire balance or return the property to the seller. There is no evidence that the seller or its assignee made any demand for all of the remaining payments but demanded only the payments which were overdue, namely, the payments due in November and December. According to this condition, before defendants' rights could be terminated, the seller must declare all the remaining payments due and in case the defendants were not able, the defendants would be required, under the conditions, to voluntarily return the property to the seller, or, failing to do so, be liable for purchase the seller might incur. Neither the seller nor its assignee, the plaintiff, complied with the terms of this condition, and therefore neither had no right to take possession of the property.

Moreover, under the law, it is usually necessary for plaintiff, before bringing an action of replevin, to demand possession of the property which is held by the defendants of it rightfully, but this he did not necessary where it appears that a demand would have been unavailing. See Cornell Co. v. Penn. Co., 94 Ill. 54; Hall and Lorenzen v. v. Wade, 230 Ill. App. 608; Chicago . . . Co. v. Ry. Co. v. Fourth Nat'l . . Co.

244 Ill. App. 522. In the instant case plaintiff made no demand for possession although it contends to the contrary. The evidence shows that counsel for plaintiff called at defendants' place of business and stated: "I represented the South Bend Lathe Works; that there was a default in its payments and I dropped out here to see if I can get those payments up to date;" that the man he was talking to was merely a working man at the place of business; and there is further evidence to the effect that on two or three other occasions a representative of plaintiff called at defendants' place of business and defendants' factory was closed. The defendants having come into possession of the turning lathe rightfully, it was necessary, under the law, that plaintiff make a demand as a prerequisite to the maintenance of this suit. If a demand had been made, defendants might have taken advantage of the condition printed on the back of the contract and paid the remaining installments, or returned the lathe.

For the two reasons stated, the judgment of the Municipal court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely and Matchett, JJ., concur.

[illegible]

McNurdy and Mitchell, M.P., counsel.

35273

PETER ARMATO,
Defendant in Error,

vs.

H. W. ELMORE & CO., a Corporation,
Plaintiff in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against the defendant to recover moneys which he had paid to the defendant on account of the purchase price of two lots and predicates his right to recover on the ground that the purported written contract entered into by the parties for the sale and purchase of the lots was void, "for want of a vendor." The case was tried by the court without a jury, the court sustained plaintiff's contention and there was a finding and judgment in plaintiff's favor for $4925.20, and the defendant appeals.

Plaintiff offered in evidence the contract entered into between the parties which he contended was void. It is between "Elmore's Westchester Realty Trust, of which The Foreman Trust and Savings Bank is Trustee, as party of the first part *** and Peter Armato *** as party of the second part," and by its terms Armato agrees to buy and the Elmore Westchester Realty Trust agrees to sell, two lots for $7500. The contract is signed "Elmore's Westchester Realty Trust, of which The Foreman Trust and Savings Bank is Trustee. By H. W. Elmore, Manager. Peter Armato (Seal)."

Among other evidence the defendant offered a written document termed a "Trust Agreement. Elmore's Westchester Realty Trust." It is dated October 1, 1926, and recites that it is entered into between William C. Tackett, Harry L. Drake and Charles F. Hough, who are designated as the beneficiaries, the Foreman Trust and Savings Bank, the Trustee, and Howard W. Elmore, Manager.

PETER ARMATO,
Defendant in Error,

vs.

H. W. KIMORE & CO., a corporation
Plaintiff in Error.

[illegible]

[illegible]

PLAINTIFF brought an action of ejectment against the defendant to recover money which he had paid to the defendant on account of the purchase price of two lots and contended the right to recover on the ground that the original contract entered into by the parties for the [illegible] of the lots was void, "for want of a vendor." [illegible] out a jury, the court entered judgment [illegible] a finding and judgment in plaintiff's favor [illegible], and the defendant appeals.

Plaintiff offers [illegible] into between the parties which [illegible] between "Kimore's Westchester Realty Trust," [illegible] Trust and having [illegible] and Peter Armato [illegible] Armato agrees to buy and the Kimore Realty Trust [illegible] to sell, two lots for [illegible] Westchester Realty Trust, [illegible] Bank in Trustee. [illegible] "

Among other [illegible] document [illegible] Trust." It is not [illegible] tered into between [illegible] Trust and Darlene Park [illegible]

It is executed by the three parties. By a supplemental agreement which the defendant offered, H. W. Elmore and Company, a corporation, was substituted in lieu of Howard W. Elmore as manager. The trust agreement recites that contemporaneously with the execution of it, the beneficiaries caused to be conveyed to the trustee certain real estate including the two lots in question; and it is provided that the title to the property should be in the bank as trustee; that Elmore should sell the lots and pay over the net proceeds to the beneficiaries and that for convenience the trust estate should be designated, "Elmore's Westchester Realty Trust." The trust agreement and supplemental agreement were, upon objection by plaintiff, excluded on the ground that they were "incompetent and immaterial."

The evidence further shows that plaintiff, from time to time, made payments on account of the purchase price as provided in the contract, and it is to recover the aggregate of these payments that he sues.

Plaintiff contends that the trust agreement was properly excluded because it was a sealed instrument, and the defendant was not warranted, under the law, in introducing "evidence denors the sealed instrument" to show that Drake, Hough and Tackett were the real vendors of the property. We think this contention is unsound and that the court erred in excluding the document. While there is conflict in the authorities, we are of the opinion that the trust agreement was admissible. Weissbrodt v. Elmore & Co., 262 Ill. App. 1; Webster v. Fleming, 178 Ill. 140; Balchunas v. Novicki, 257 Ill. App. 157; Wilson v. Bodamer, 261 Ill. App. 23; Daugherty v. Heckard, 189 Ill. 239; Peine v. Weber, 47 Ill. 41; Edwards v. Dillon, 147 Ill. 14; Wilcox v. Dodge, 12 Ill. App. 517; 47 Corpus Juris, p. 844; Lipke v. Foreman-State Trust & Savings Bank, Appellate

Court, First Dist., No. 35051; 17 Amer. & Eng. Ency. of Law, 1st ed., p. 1002.

In the Weissbrodt case, supra, where the identical form of contract and trust agreement were involved, except as to the name of the purchaser of the lots, the Second division of this court held that Tackett, Drake and Hough were co-partners engaged in business under the name of "Elmore's Westchester Realty Trust," and it was there held that the contract for the purchase and sale of lots was binding. Certiorari was denied by the Supreme court in that case at the October term, 1931.

In the Peine case (47 Ill. 41) it was held that a sealed contract executed by one of several partners, but without authority under seal, if made for the benefit of the firm and relating to partnership business, was binding on all partners if they assented to the making of the contract and that such assent may be given at the time or subsequently, and that this assent might be proved by parol. The court there said (pp. 44-45): "The rule is now well established, that one partner is bound by a deed executed on behalf of the firm by his co-partners, if for the benefit of the firm, and in relation to the partnership business provided there was a proper parol authority given, or a subsequent ratification or parol adoption of the act by the other parties." *** that one partner might "execute a deed under seal, which will be binding on the other, if he has foreknowledge, or subsequently ratifies it, and this may be proved by acts and circumstances, or by his verbal declarations and admissions."

In the Edwards case (147 Ill. 14), the rule announced in the Peine case is adhered to. In that case a written document was signed "Levi Dillon & Sons. (Seal)" and the defendant sought to show that there were four partners who constituted the firm of Levi

Court, First Dist., No. [illegible] 1[illegible] Cal. [illegible], [illegible], [illegible] ed., p. [illegible].

In the [illegible] case, [illegible] to [illegible] form of contract and [illegible] [illegible] the basis of the [illegible] [illegible] court held that [illegible] in business under his [illegible] and it was [illegible] of late has binding. Certiorari [illegible] in that case [illegible].

In the [illegible] case [illegible] sealed contract executed [illegible] authority under seal, [illegible] letting to a [illegible] assented to the making of the contract [illegible] given at the time or subsequently, [illegible] proved by proof. The [illegible] now well established, that [illegible] on behalf of the firm [illegible] the firm, and in relation [illegible] there was a proper [illegible] tion or proof adoption [illegible] one partner [illegible] lon or the other, [illegible] it, and this may be [illegible] verbal declarations [illegible]."

In the [illegible] case [illegible] In the [illegible] case is [illegible] was signed "[illegible] [illegible] show that there were four partners and [illegible]

Dillon & Sons and the court held this might be done by oral testimony. The court said (p. 19): "But it is urged by appellant that the court erred in allowing the defendant to introduce, over plaintiff's objection, oral proof of the partnership, upon the alleged ground that the contract sued on was under seal, and that Levi Dillon had no power to sign a sealed instrument for the firm, and that, therefore, under the law the signature was that of Levi Dillon alone, and that he alone was liable." The court then said this was the rule at common law but that the harshness of this rule had been modified by American courts which held that (20) "where an express or implied authority or confirmation could be justly established not under seal, whether it be verbal or in writing, or circumstantial.*** The prior assent or subsequent ratification may not only be by parole, but may be implied from declarations, or from acts and circumstances."

In the Daugherty case, 189 Ill. 239, the court said, (p. 245): "In actions against the members of a firm on instruments signed by the firm name, parol evidence to show who are the persons composing the firm is always admissible, and in nowise controverts the rule that parol evidence is inadmissible to contradict, vary or alter a written instrument. The firm name is such as the co-partners choose to adopt. It may disclose the names of all the partners or of none of them, or the name of but one of them may be used as the firm name. (17 Amer. & Eng. Ency. of Law, 914). Where a written instrument bears the name of but one person, presumably it is the undertaking of that person; but it is competent to establish by parol proof that the contract is that of the co-partnership and that the firm entered into the contract in the name and style of the individual."

Under the holding in the Weissbrodt case, supra, we

hold that the contract entered into between the parties in the instant case is not void for the lack of a vendor, but that it is valid and binding, and the court erred in excluding the trust agreement offered on behalf of the defendant.

The judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely and Matchett, JJ., concur.

35274

MICHELE ARMATO and PROVIDENZA ARMATO,
Defendants in Error,

vs.

H. W. ELMORE & CO., a Corporation,
Plaintiff in Error.

ERROR TO SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

We have this day filed an opinion in case No. 35273, Peter Armato, Defendant in Error, vs. H. W. Elmore & Co., a Corporation, Plaintiff in Error, where the nature of the suit, the evidence, and all facts and circumstances involved are the same and where the same briefs have been filed, the only difference being the name of the party plaintiff and the amounts involved. For the reasons therein stated, the judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely and Matchett, JJ., concur.

35188

ROSE BEILIN, individually and as executrix of the estate of Louis Beilin, deceased,
Defendant in Error,

v.

KRENN & DATO, Inc., a corporation,
Plaintiff in Error.

ERROR TO SUPERIOR COURT,

COOK COUNTY.

263 I.A. 643

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of trespass on the case on promises to recover moneys paid under two contracts for the purchase of real estate. The cause came on for trial without a jury. The issues were found for plaintiff and damages were assessed at $9513.04 and judgment was entered on the finding. Defendant seeks a reversal.

Plaintiff offered in evidence the contracts of purchase which she contended were void as providing for no vendor. They are between: "Devonshire Manor Realty Trust, of which Chicago Title and Trust Company is Trustee, as party of the first part, and Louis Beilin and Rose Beilin, as parties of the second part." By the terms the parties of the second part agreed to buy certain lots in Krenn & Dato's Devonshire Manor subdivision. The contracts are signed: "Devonshire Manor Realty Trust, of which Chicago Title and Trust Company is Trustee, By Claude C. Phillips, Asst. Manager First Party Louis Beilin (SEAL) Rose Beilin (SEAL) Second Party."

Plaintiff's theory is that the agreements purporting to be made by the Beilins were not made with any living or artificial person and by reason thereof were wholly null and void and therefore she was entitled to recover back the money paid.

15193

ROCK KEILIN, individual ly and as executrix of the estate of Louis Keilin, deceased, defendant in error,

v.

KNOX & [illegible], Inc., a corporation, plaintiff in error.

[illegible] Error to the [illegible] Court of [illegible] County.

Mr. [illegible] [illegible] for the plaintiff in error.

Plaintiff brought an action of [illegible] against the defendant in error, [illegible] promissory note [illegible] for the purchase of real estate. [illegible] a jury. The issues were found for [illegible] and judgment was entered on the finding. [illegible] seeks a reversal.

Plaintiff alleges in [illegible] of pleadings which are concerned are void [illegible] for no vendor. They are between: "Davenshire [illegible] Trust, of which Ohio Title and Trust Company is trustee, [illegible] first party, and Louis Keilin and Rose Keilin, [illegible] of the second part." By the terms the property [illegible] Keilin lots in Krenn & [illegible] addition [illegible]. The contracts are signed: "Davenshire [illegible] Trust, [illegible] Title and Trust Company is trustee, by [illegible], sec. Manager first party [illegible] second party."

Plaintiff's theory [illegible] contracts purporting to be made by the [illegible] [illegible] artificial person and by [illegible] all [illegible] and void, and therefore she was entitled to recover back [illegible] money paid.

Defendants offered in evidence an agreement and declaration of trust deed dated October 1, 1923, between Edith Rockefeller McCormick, Edwin D. Krenn and Edward A. Dato. This organized a trust to be known as the Edith Rockefeller McCormick Trust, designating Edith Rockefeller McCormick, Edwin D. Krenn and Edward A. Dato, as Trustees, to engage in business of all kinds. Defendant also introduced evidence to the effect that the trustees of the Edith Rockefeller McCormick Trust had purchased tracts of land, of which the lots in question were a part, which had been conveyed to Edward A. Dato, as Trustee, for the use and benefit of the trust and by him conveyed to the Chicago Title & Trust Company, as Trustee. Defendant also offered a trust agreement dated June 2, 1926, between Edith Rockefeller McCormick, Edwin D. Krenn and Edward A. Dato, as Trustees of and under the Edith Rockefeller McCormick Trust, and the Chicago Title & Trust Company, a corporation, as Trustee, and Edward A. Dato, Manager, and Claude C. Phillips, Assistant Manager. This document recited that the tract of land had been conveyed to the parties of the second part, as Trustees, in order to facilitate its sale. It is also provided that the trust estate should be known as Devonshire Manor Realty Trust and the manager was given exclusive right to manage and control it for the purpose of disposing of it; also that contracts of sale should be executed in the name of the Devonshire Manor Realty Trust. Defendant also offered the appointment by Mr. Dato, as Manager, and the Trustees of the Edith Rockefeller McCormick Trust, of Krenn & Dato, Inc., as agent, to sell the property. The contract of Krenn & Dato with the Beilins was also offered. It was also offered to show that the improvements provided for by these contracts had been installed and paid for by the Edith Rockefeller McCormick Trust. There was also evidence that the Chicago Title & Trust Company was

[illegible]

acting as Trustee and held title at the time of the trial for the use and benefit of the Trustees of the Edith Rockefeller McCormick Trust. Also two deeds were offered from the Chicago Title & Trust Company conveying to the grantee, Rose Beilin, the lots with two owner's guarantee policies and tendered the same subject to the condition that the balance of the purchase price be paid therefor.

At the close of all the evidence complainant moved to strike all the foregoing evidence offered on behalf of defendant as immaterial and if allowed to stand would tend to vary the terms of a written agreement under seal. This motion was allowed. All of this evidence was competent as tending to show that the vendors were Edith Rockefeller McCormick, Edwin D. Krenn and Edward A. Dato, as Trustees of the Edith Rockefeller McCormick Trust.

We have had recent occasion to consider all the questions raised in the briefs before us. In Weissbrodt v. Elmore & Co., 262 Ill. App. 1 (certiorari denied by the Supreme Court) we held that the defendant was entitled to present its defense similar to that presented here. We this day are handing down two opinions expressing our views to the same effect - Armato v. Elmore & Co., number 35273, and number 35274, this court. What we have there said controls our decision in the instant case.

We hold that the testimony offered on behalf of defendant was admissible and that it was error to exclude it. The judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

acting as Trustee one held title to the land of the trust for the use and benefit of the Trustee of the [illegible] Rockefeller Mortgage Trust. Also the deeds were offered from the Chicago Title & Trust Company conveying to the grantee, [illegible] Mellin, the lots with the owner's guarantee policies and transfer the same subject to the condition that the balance of the purchase price be paid thereafter.

At the close of all the evidence defendants moved to strike all the foregoing evidence offered on behalf of defendant as immaterial and it allowed to stand would lead to very grave loss of a written agreement under seal. This motion was allowed. All of this evidence was competent as tending to show that the vendors were Edith Rockefeller [illegible] Mayor Jack, Robert D. Krenn and Edward M. Jack, as Trustees of the Edith Rockefeller Mortgage Trust.

We have had recourse [illegible] the authorities cited and the questions raised in the briefs before us. In Schlichting v. Illinois [illegible], 289 Ill. App. 1 (rehearing denied [illegible]), [illegible] and the defendant was entitled to prove it [illegible] presented here. In this day and [illegible] our views to the same effect - [illegible] v. Illinois [illegible], docket 38279, and number 38272, this court. [illegible] decision in the instant case.

We hold that [illegible] evidence [illegible] and can admissible and [illegible] judgment in therefore reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Hanecy, J., concur.

35188

SUPPLEMENTAL OPINION.

Pursuant to stipulation of the parties the above opinion is hereby modified so that the judgment is reversed without remanding.

REVERSED.

We find as a mixed question of law and fact that the two agreements upon which this suit is based, are the valid and binding contracts of the plaintiff and Louis Beilin, as purchasers, and three living persons as vendors, namely, Edith Rockefeller McCormick, Edwin D. Krenn and Edward A. Dato as Trustees of Edith Rockefeller McCormick Trust.

SUPPLEMENTAL OPINION.

Pursuant to stipulation of the parties, the above opinion is hereby modified so that the judgment is reversed without remanding.

REVERSED.

We find as a mixed question of law and fact that the two agreements upon which this suit is based, are the valid and binding contracts of the plaintiff and Louis Heilin, as purchasers, and three living persons as vendors, namely, Edith Rockefeller Rockwelck, Edwin S. Ireen, and Edward . Dato as Trustees of Edith Rockefeller Rockwelck Trust.

35238

MARY LERK,
Appellee,

v.

GEORGE W. McCABE et al.,
Defendants.

On appeal of CHICAGO TRUST COMPANY, a corporation, Receiver for the Lake View State Bank, a corporation,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Complainant filed her bill asking for the return of $20,000 and a $10,000 trust deed and notes given by her for the purchase of the Belle Pine Apartments, located at 466-468 Belmont avenue, Chicago. Subsequently, one of the defendants, Lake View State Bank, became insolvent and the Chicago Trust Company was appointed receiver. The cause was referred to a master who took evidence and filed his report recommending that complainant be granted the relief sought. This was confirmed by the court and a decree entered accordingly. The Chicago Trust Company, as receiver ~~xxxx~~ appeals.

George W. McCabe, the first named defendant, died after suit was started and his executors were substituted as parties defendant.

The gist of complainant's bill is that she was misled into buying the Belle Pine Apartments to her hurt by the defendant, McCabe, president of the Lake View State Bank, and certain of its officers with whom there was a fiduciary relationship, whereby she

MARY LOPE,
Appellee,

v.

GEORGE W. MOOKER et al.,
Defendants.

On appeal of CHICAGO TITLE & TRUST COMPANY, a corporation, Receiver for the Lake View State Bank, a corporation, Appellant.

Mr. JUSTICE MORGANTHAU delivered the opinion of the court:

Complainant filed its bill seeking the revision of $80,000 and a $10,000 trust deed note [illegible] by her for the purchase of the Belle Plaine apartments, located on Sheridan Boulevard avenue, Chicago. Consequently, one of the [illegible], Lake View State Bank, became insolvent and the [illegible] appointed receiver. He claimed [illegible] the trust deed note evidence and filed his report [illegible] that complainant be granted the relief sought. This was confirmed by the court and a decree entered accordingly. The Chicago Title & Trust Company, as receiver xxxxx appeals.

George W. Mooker, the first mortgagee, died after suit was started and his [illegible] substituted as petition defendant.

The gist of complainant's allegations in its bill was that mislead into buying the Belle Plaine apartments by the defendant, Mooker, president of the Lake View State Bank, and a clerk of the officers with whom there [illegible] fraudulently, thereby and

depended upon their representations which subsequently proved to be contrary to the facts. The bill alleges as grounds for the relief sought: (1) that complainant was misled into paying $125,000 for the Belle Pine Apartments which were worth some $30,000 less than this amount; (2) that defendants falsely represented that there was a 13 year lease of the premises at a rental of $1250 a month; (3) that George W. McCabe, then president of the Lake View State Bank, and the bank guaranteed complainant an income of $250 a month net; (4) that defendant McCabe without authority from complainant had included in the warranty deed whereby she acquired title a clause assuming a mortgage of $90,000, which was then a lien on the property; (5) a fiduciary relationship subsisted at the time of the transaction in question between complainant and these defendants.

The facts touching this last point are that McCabe had been for many years more or less intimate with James E. O'Boyle, the father of complainant. Just how intimate is not clearly disclosed. In September, 1919, complainant was declared mentally incompetent and her father and McCabe were appointed conservators of her estate.

In July, 1922, while complainant was still under the conservatorship of McCabe, her father executed his last will and testament, in which the Lake View State Bank, George W. McCabe and James P. O'Boyle were appointed executors and trustees. All of his property, valued at approximately $150,000, was left to said executors as trustees. The beneficiaries were a sister, who was given certain monthly allowances during her life, and the testator's three children, of whom complainant was one, sharing in the estate equally except for a 280 acre farm in Iowa which was left to complainant alone. No distribution was to be made for ten years after the death of the testator, which occurred in

depended upon their representations which [illegible] to be contrary to the truth. [illegible] for the relief sought (1) in a complaint [illegible] into court $183,000 for the mills [illegible] $80,000 less than this amount [illegible] represented that there was a [illegible] of the premises at a rental of $150 a month; [illegible] a [illegible], then president of the Lake View [illegible] an [illegible] income of $150 a month [illegible] authority from complainant [illegible] she required title a [illegible] was then a lien on the property, (2) a [illegible] related to the time of the transaction in [illegible] between complainant and these defendants.

The [illegible] last point [illegible] been for many years more or less [illegible] the father of complainant. [illegible] disclosed. [illegible] incompetent and [illegible] of her estate.

In July, 1942, [illegible] conservatorship of [illegible] testament, in which [illegible] and James [illegible] of his property, valued at [illegible] said executors as trustees. [illegible] who was given certain monthly [illegible] the testator's three children, [illegible] in the estate equally [illegible] left to complainant [illegible] ten years after the death of [illegible], which occurred in

September, 1922. The Lake View State Bank was designated as depository for the trust funds of the estate. McCabe and the bank accepted the appointments and acted jointly with James P. O'Boyle as trustees during the entire time the instant transaction occurred. In November, 1922, an order was entered finding that complainant was restored to her reason. Complainant was a depositor in the Lake View State Bank. During the time of the instant transaction she lived in California with her husband.

It is earnestly argued that these prior incidents, having terminated in 1922, failed to show that there was any fiduciary relationship subsisting in 1926, the time of the instant transaction. Whether or not a fiduciary relationship exists ordinarily depends upon a number of facts and occurrences, all of which tend to throw light upon the question of the existence of such relationship. The facts just related clearly show that on and prior to 1922 the relations between the parties was unusually close and intimate and tended to establish a fiduciary relationship. Can it be said that this relationship terminated on the very day these prior transactions terminated? Such a relationship is one of faith and confidence and is not controlled by a time table; it is the result of many circumstances which may be near or remote in point of time.

Opposed to the position of complainant and as showing that she acted upon her own volition on information obtained by herself, defendants point out that complainant was fully acquainted with the Belle Pine Apartments; that she was born and reared in the neighborhood and had lived within two and a half blocks of these premises for twenty-five years prior to the fall of 1925; that she herself owned the six-flat apartment building in which she lived; that in 1925 she sold her apartment building, being assisted by her attorney, Mr. Charles. It is not known that McCabe or any officer of the bank advised her in this matter or had any connection with it.

instant

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In November, 1925, she entered into negotiations for the purchase of the Belle Pine Apartments. The real estate broker, with whom she dealt, testified that he first submitted to her other property farther north, but she expressed a desire to purchase a building within the immediate neighborhood in which she lived "because she was born and raised in that district and her father had owned property in there and she understood values probably better in the Lake View district than in any other district." There was evidence tending to show that complainant with her husband examined the Belle Pine Apartments rather thoroughly, going into some of the apartments as well as the basement, boiler room and back porches. Complainant also at this time questioned the women in charge of the building regarding its gross income, the amount of help required to maintain the same and arrangements necessary for electricity, gas and telephone service. Complainant was then ready to buy the property at $125,000, and deposited a check for $30,000 with the Lake View State Bank as part payment on the purchase. This sale was not consummated and later the money deposited was returned to complainant.

It is forcefully argued that, when complainant again became interested in the property in October, 1926, she did not depend upon McCabe or any of the defendants for information relative to this; that she knew the character of the building and the occupancy and at this time was ready to go through with the deal and relied upon her attorney, Mr. Charles, to look after her interests.

It is difficult to determine with certainty whether or not complainant in the fall of 1926 was relying upon information to be furnished her by McCabe and the bank or whether she was moved towards the purchase of the property by the information acquired by herself and whether or not her conclusion to buy in 1926 was simply a continuation of her desire shown the year before. However, we

In November, 1952, one [illegible] of the premises of the Belle Vue [illegible] October, with whom she dwelt, [illegible] property [illegible] within the [illegible] was burn and [illegible] property in there and she [illegible] in the Lake View district than [illegible] dence tenants to [illegible] the Belle Vue [illegible] experiences on [illegible] complainant also [illegible] building regarding the gross income, the [illegible] to maintain the wires and [illegible] pes and telephone service. [illegible] property as [illegible], and [illegible] Lake View [illegible] was not [illegible] complaints.

It is [illegible] came interested in the property [illegible] upon Hodge or any of the [illegible] that the [illegible] and at this time [illegible] upon her attorney, Mr. [illegible] interests.

It is difficult to [illegible] not complainant in the fall of 19[illegible] to be furnished her by [illegible] tenancy the [illegible] berself and whether or not her [illegible] a continuation of her [illegible] Moreover, we

hold that the determination of complainant's claim presented by her bill does not rest upon an opinion upon this point. We shall assume that the master and the chancellor were correct in holding a subsisting fiduciary relationship and shall rest our opinion upon the failure of the complainant to prove her allegations of misrepresentation with reference to the premises.

Prior to 1926 the Belle Pine Apartments had been owned by Agnes G. McLaughlin and her husband and they were heavily indebted to the Lake View State Bank. A building corporation was formed called the Belle Pine Building Corporation which on February 24, 1925, acquired title to the premises from the McLaughlins and all the capital stock of the corporation, except one share, was owned by Agnes G. McLaughlin and her husband. In June, 1926, the Belle Pine Building Corporation executed its note secured by trust deed conveying the premises, in the sum of $40,000, which trust deed was subject to three prior trust deeds on the property, securing an aggregate indebtedness of $99,000. All the capital stock of the corporation was transferred to Catherine G. McCabe (a daughter of George W. McCabe, president of the bank), O. D. Granstrand (assistant cashier of the bank) and Richard F. Hickey (an employee of the bank), and these bank officials were elected directors of the building corporation. These shares of stock in the building corporation were held by the bank as collateral security for the payment of a note of the McLaughlins. At the same time a written agreement was entered into between the McLaughlins and Frank J. O'Donnell, a real estate broker, that in the event of a sale of the premises the net proceeds should be applied on the indebtedness of the McLaughlins to the Lake View State Bank.

In October, 1926, Granstrand, the assistant cashier of the bank, was in Los Angeles and had an interview with complainant. Mr. Lerk testified that Granstrand took the initative and said he

held that the defendants plan of complaint, that [illegible] by her bill does not rest upon an equitable [illegible] shall assume that the [illegible] in holding [illegible] opinion upon the [illegible] of [illegible] of misrepresentation [illegible] the petition.

Prior to 1920 the Dale [illegible] by James G. McLaughlin and [illegible] subject to the Lake View Bank [illegible] formed called the Dale [illegible] 24, 1920, negative title to the [illegible] all the capital stock of the corporation, except one share, was owned by James G. McLaughlin and his brother. In June, 1920, the Dale Place building corporation was [illegible] by [illegible] deed conveying the premises, in [illegible] W. [illegible] deed was subject to three prior [illegible] aggregate [illegible] of [illegible]. In the capital stock of the corporation was transferred [illegible] McLaughlin to George W. McLaughlin, [illegible] of the bank, [illegible] member of the bank) and Michael [illegible] Lohry (an employee of the bank), and these same officials were [illegible] of the building corporation. These shares of stock in the [illegible] corporation were held by the bank as collateral security for the payment of a note of the McLaughlins. [illegible] subject to [illegible] and [illegible] estate broker, and in the [illegible] of a [illegible] of the premises the [illegible] proceeds should be applied on the indebtedness of the McLaughlins to the Lake View State Bank.

In October, 1923, [illegible], the president and cashier of the bank, who in [illegible] with complainant. Mr. Lark [illegible] the [illegible] and [illegible] to

wanted to see complainant and called on her. There is some dispute as to just what was said. Complainant's version of the conversation is that Grandstrand said that the property paid $15,000 a year and that it would be financed by the bank in such a way as to give complainant $250 a month to live on; that there was a 13 year lease of the premises. Complainant said she could not make a cash payment of more than $20,000 and Granstrand promised to find out from the bank or McCabe whether or not $10,000 more could be advanced to her. Upon Granstrand's return to Chicago he sent a wire to complainant inquiring whether she would make the offer as suggested and that McCabe said the matter should not be delayed. Complainant replied by telegram to McCabe authorizing an offer of $112,000 ~~xxxxxxxxxxxxxxxx~~ and requesting an itemized statement of all expenses and all about the lease, taxes and interest. O'Donnell testified that he submitted this offer to Mrs. Laughlin who refused, insisting on her price of $125,000. McCabe then telegraphed that the property could not be bought for less than $125,000 and recommended it as a fine proposition, and undertaking to finance it so as to leave complainant $250 a month from the property. On November 5th McCabe again wired, giving a more detailed statement as to the property, leases, etc. Among other things, this rather lengthy telegram contained the statement that the property was rented for "fifteen thousand each year for thirteen years payable each month tenant owns furniture Mrs. Gleason considered good tenant" and also stating that "this deal would leave you two hundred fifty per month." In reply, complainant wrote enclosing a draft for $20,000. Prior to the receipt of this letter McCabe telephoned to Albert E. Charles, complainant's attorney, who had represented complainant in the sale of her own property in 1925, saying that the Belle Pine Building is "a wonderful buy for Mrs.

Lerk. I recommend her to buy it. I want you to wire her recommending it." He further stated if she bought it she would have $250 net a month and that he would finance the proposition for her. Charles wired complainant: "Mr. McCabe recommends highly your purchasing Belmont avenue property." Under date of November 8, 1926, complainant wrote to McCable enclosing $20,000, the amount required for deposit, also that she had wired Mr. Charles to look over all papers. She said: "I am trusting to you, Mr. McCabe, to see if there is any special assessment on the street as the way I understand it is clear." She also requested that a $90,000 mortgage for seven years should be made and "don't let Mr. Charles delay it too long." She thanked Mr. McCabe and Mr. Granstrand "for your personal interest" and requested that the premises should be conveyed to her. The sale was finally consummated by deed dated December 16, 1926, and recorded December 30. The deed recited a consideration of $125,000.

The first point alleged by complainant is that the apartments were worth some $30,000 less than the consideration - $125,000 - which she was misled into paying by defendants. This allegation was not proven. A number of real estate experts testified that the fair cash market value of this property at this time was from $130,000 to $150,000. Complainant produced witnesses who placed the value at much less. The master reported that the preponderance of the evidence as to the value of the premises was with defendants and found that its fair market value in the Fall of 1926 was $125,000. Complainant filed objections to this part of the master's report, which were overruled and later stood as exceptions before the chancellor and again overruled and the decree confirmed the report of the master. No cross-errors are assigned in this court The defense that the premises were worth fully, if not more than, the amount communicated by McCabe to complainant and which she paid

was amply proven.

The only other important alleged misrepresentation is with reference to the lease of the premises. McCabe's telegram contained the following information regarding this:

> "Five thousand paid on lease ** rent is fifteen thousand each year for thirteen years payable each month tenant owns furniture Mrs. Gleason considered good tenant."

And also the statement: "this deal would leave you two hundred fifty per month." It is not disputed that at the time this telegram was sent there was on record an instrument purporting to be a lease to Mrs. Gleason covering the premises for a term of years ending September 29, 1939. Neither is it disputed that there was a $5,000 deposit as security. Mrs. Gleason occupied the premises under this lease and paid the specified rent - $1250 per month - until June, 1927, which was turned over to complainant less expenses. The theory of complainant was that the lease to Mrs. Gleason was not valid at this time, and the master and chancellor so found. To determine the correctness of this conclusion, it is necessary to examine with some particularity the leases.

March 14, 1924, Agnes G. McLaughlin owned the apartments in her own name and on this date made a lease to Lillian Lew and Ida Mandelman, for a term of 15 years, expiring September 30, 1939, at a rental of $1250 a month, and a deposit of $5,0 0 as security was made. The lessees took possession under the lease, but shortly thereafter Mrs. Mandelman assigned her interest to Minnie Klawans. February 24, 1925, Mrs. McLaughlin conveyed the property to the Belle Pine Building Corporation by warranty deed. April 22, 1925, Mrs. Klawans and Mrs. Lew assigned to Albert C. Lewis, who, in turn, assigned to Zed C. Worthington. In each of these cases Mrs. McLaughlin purported to accept the assignee and to release the assignors. No consent or release was signed by the

was easily proven.

The only other [illegible] is with reference to the lease of [illegible]. [illegible] contained the following [illegible]:

> "Five thousand will be [illegible] each year for thirteen years [illegible] owns furniture [illegible]."

And also the [illegible] "this deal [illegible] fifty per month." It is not [illegible] grew was sent there was no record [illegible] a lease to Mrs. Gleason covering the [illegible] ending September 30, 1939. [illegible] a $8,000 deposit on security. Mrs. Gleason [illegible] under this lease and said the [illegible] until June, 1937, which was turned over [illegible]. The theory of some [illegible] was [illegible] valid at this time, and the [illegible] testing the correctness of this [illegible] examine with some personal pity the lease.

[illegible] 15, 1934, Agnes [illegible] remain in her own home and on [illegible] and Ida Sandelman, for a term of 15 years, [illegible] 1939, at a rental of $1500 a month, [illegible] security was made. The lessees took possession [illegible] but shortly thereafter Mrs. Sandelman [illegible] Minnie Klawans. [illegible] 1, 1937, Mrs. [illegible] property to the Italian [illegible] April 22, 1938, Mrs. Klawans [illegible] Lewis, who, in turn, assigned to [illegible] these cases are [illegible] release the assignors. No consent or [illegible]

corporation. Worthington relinquished possession of the premises and Mrs. Klawans testified that Mrs. McLaughlin "stepped into the place," although there is no showing that she terminated the original lease. Mrs. Klawans then resumed possession with the consent of Mrs. McLaughlin. Mrs. Klawans testified that she was reinstated by Mrs. McLaughlin and that her attorneys had the reinstating "paper." Shortly after this Minnie Klawans and Lillian Lew made a lease to Odile E. Gleason for a term beginning October 1, 1926, and ending September 29, 1939, at the original rental of $1250 a month. Mrs. Gleason continued to occupy the premises and paid the rent called for by the lease until June, 1927. No tenant or sub-tenant under the lease or sublease has ever denied any obligation under the lease.

It should be noted that the alleged releases given to Mrs. Klawans, Mrs. Lew and Lewis by Mrs. McLaughlin were by the latter individually at the time when the title was in the Belle Pine Building Corporation. There is no evidence that the deed to the Corporation contained any reservation of the rents. If there is no reservation, the warranty deed conveys the lessor's interest in an unexpired lease. Dixon v. Niccolls, 39 Ill. 372; Sizemore v. McDaniel, 239 Ill. App. 280; Barnes v. Northern Trust Co., 169 Ill. 112. If Mrs. McLaughlin had no power to release Mrs. Klawans and Mrs. Lew, they remained bound by the obligations of the lease and could not escape such obligations by assigning their term, and upon going back into possession after their assignee relinquished possession they could give a valid sublease to Mrs. Gleason for a term virtually the same as the original lease. Furthermore, there was sufficient evidence to show there was an oral recognition of the existence of the lease. Other considerations might be mentioned leading to the conclusion that Mrs. Gleason was legally bound under

corporation. [illegible]
and Mrs. Stevens [illegible]
place," although there [illegible]
legal issue. Mrs. Stevens [illegible]
consent of her husband. [illegible]
reinstated by his [illegible]
instating "women." Shortly [illegible]
how made a lease to [illegible]
1, 1919, and ending September 30, [illegible]
$1500 a year. Mrs. Stevens [illegible]
paid the rent called for by the lease until [illegible]
or sub-tenant under the lease or multiplex [illegible]
litigation under the lease.

It should be noted [illegible]

Mrs. Stevens, [illegible] by [illegible]
latter individually [illegible]
Pine Building Corporation. [illegible]
the Corporation [illegible]
is no reservation, [illegible]
in an unrelated lease. [illegible] 259 Ill. App. 2d; [illegible] 100 Ill.
112. If Mrs. Stevens, [illegible]
Mrs. Lee, they remained [illegible]
could not assume such obligations by [illegible]
going back into possession [illegible]
session they could give a valid [illegible]
virtually the same as the [illegible]
sufficient evidence to show [illegible]
existence of the lease. [illegible]
leading to the conclusion that [illegible]

her lease and that the statement of McCabe regarding the lease was true.

It should be suggested further that apparently McCabe was a layman and in good faith might conclude from the record of the lease to Mrs. Gleason that it was a valid, binding obligation. The statement in his telegram that Mrs. Gleason was considered a good tenant was merely a report as to her standing which was justified from the fact that she had been paying the rentals called for by the lease.

Even if the validity of the lease might be open to doubt which could only be determined by a lawsuit, yet we do not find that the record shows that the representation of McCabe with reference to it, even if based upon a mistake of law, was the cause of complainant subsequently losing the property. After the deal was closed the bank continued to manage the property and the complainant continued to receive her rents and her monthly remittance of $250 net until June, 1927. In July McCabe wrote her a letter with reference to the rental situation, saying that "The bottom has dropped out of the furnished room and apartment business" and advising complainant to consider a reduction in rental. Later Mr. Charles was informed that an arrangement was made for a meeting to be held with the lessees of the Belle Pine Apartments and invited him, as complainant's representative, to attend. Mr. Charles did so. In August complainant sent a telegram to McCabe saying that she had not heard from Charles regarding the deal and was waiting for the July and August rents. In September she returned to Chicago and lived in the apartments for a time. In October complainant tendered to the cashier of the bank and to Catherine McCabe, an employee of the bank, the lease of the Belle Pine and an assignment thereof and a quit-claim deed signed by complainant and her husband, and asked for the re-

her lease and that the statement [illegible] true.

It should be emphasized [illegible] was a layman and in good faith [illegible] the lease to Mrs. Gleason that it was [illegible] The statement in his telegram [illegible] good tenant was merely a report [illegible] filed from the fact that she had been paying the rent called for by the lease.

Even if the validity [illegible] doubt which could only be [illegible] find that the record shows that the [illegible] reference to it, even if based [illegible] of complainant subsequently [illegible] closed the bank contained [illegible] continued to receive her rents and her [illegible] not until June, 1927. In July [illegible] errors to the rental situation, [illegible] out of the furnished room and [illegible] plaintiff to consider a reduction in rental. [illegible] informed that an arrangement was made for a [illegible] the lessees of the Hall. The [illegible] plaintiff's representative, [illegible] complainant sent a telegram [illegible] from Charles Together, the [illegible] August rents. In September the [illegible] months for a time. In October [illegible] for of the bank and to determine [illegible] the lease of the Hall the [illegible] dead signed by complainant [illegible]

turn of the $20,000 originally paid by her, less the sum of $1,000 received by her out of the rents. About November, 1927, a bill was filed for a foreclosure by the holder of certain bonds secured by trust deed and a decree was entered June, 1928, and the premises sold under decree on July 25, 1928. There was no deficiency.

It was nearly five months after the first default in the rent that complainant sought to rescind the transaction by tendering back the property. There can be but little doubt that the decline in the rentals was because of changing economic conditions which, of course, were not guaranteed by defendants.

The claim that there was a guaranty of $250 a month net is not supported by the evidence. The amount of the net income would depend upon factors such as taxes, etc., over which defendants had no control. The amount of $250 a month was merely a suggestion as to probabilities. The record does not support the allegation of misrepresentation on the part of defendants as to the lease.

Complainant earnestly argues that McCabe and the bank were moved to persuade her to purchase the property because of the existing indebtedness of the McLaughlins to the bank, which a sale of the premises would enable the McLaughlins to clear. The transaction was of benefit to the McLaughlins who were thus enabled to pay off some of their obligations, but not to any considerable extent. Condensing the situation, the McLaughlins owed the bank before the sale $99,409. As a result of the sale something over $15,000 was applied on account of this indebtedness, but this $15,000 item was not all in cash; $10,000 of it was represented by the note executed by complainant which the bank agreed to take as a substitute for the McLaughlin notes. This $10,000 note was subject to preceding obligations of $90,000.

[illegible] sum of the [illegible],000 originally paid by [illegible] [illegible] received by him out of the trust. [illegible] was filed for a [illegible] by the [illegible] by trust deed and a decree [illegible] was sold under decree of [illegible]

It was merely [illegible]

the fact that [illegible] tendering [illegible] the property. [illegible] the defense in the [illegible] tions which, of course, were not [illegible]

The claim that there was a [illegible] not is not supported by the evidence. [illegible] would depend upon factors such [illegible] ents had no control. The [illegible] gestion as to probabilities. [illegible] location of [illegible] leases.

Complainant [illegible] were moved to persuade him to [illegible] the existing [illegible] sale of the premises [illegible] transaction was of benefit [illegible] to pay off some of their [illegible] extent. Considering the [illegible] before the sale $22,480. [illegible] $15,000 was applied [illegible] $12,000 item was not all [illegible] by the note executed by [illegible] as a participate for the [illegible] subject to [illegible]

The warranty deed executed by the Belle Pine Building Corporation to complainant contained a clause that the conveyance was subject to a trust deed given to secure $90,000 and interest "which the grantee assumes." Complainant asserts that she did not know there was any such assumption clause in the deed and that it was inserted by McCabe without her consent. There is no dispute as to the amount of this first mortgage. It was in accordance with the agreement with complainant. The terms were fully set forth by McCabe in his telegram of November 5, 1926, and the correspondence indicates that complainant was bargaining for the whole property, not merely for the equity. If the encumbrance is deducted from the purchase price, the grantee becomes liable for the debt. Ray v. Lobdell, 213 Ill. 389. Furthermore, complainant and her husband executed a second mortgage note and trust deed for $10,000, which by its terms was made subject to the original trust deed dated November 15, 1926, given to secure $90,000 and the "Grantors covenant and agree as follows: ** to pay all prior encumbrances and the interest thereon, at the time or times when the same shall become due and payable." It should be noted that the complainant forwarded these instruments to her attorney to examine before they were handed to the defendant bank. Complainant has not been injured by this provision, as there was no deficiency judgment entered against her in the foreclosure proceedings.

We conclude that complainant has failed to prove the allegations of her bill concerning misrepresentations made by defendants which induced her to purchase the property. The decree, therefore, will be reversed and the cause remanded with directions to dismiss the bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and Matchett, J., concur.

[illegible]

Corporation is an Alabama [illegible] was subject to a trust deed given [illegible] "which has greater security." [illegible] knew there was no such [illegible] it was inserted by [illegible] an to the mortgage of [illegible] the agreement with [illegible] McCabe in his testimony [illegible] indicate that [illegible] not merely for the security. [illegible] the purchase price, the grantee [illegible] v. Lofdahl, [illegible] band executed a second [illegible] water by the trustee [illegible] dated November 15, 1[illegible] covenant and agree to [illegible] the interest thereon, [illegible] come due and payable. [illegible] warded these [illegible] were handled [illegible] tured by this provision, [illegible] terest against [illegible]

[illegible] allegations [illegible] Ins. Co. [illegible] therefore, [illegible] to his law [illegible]

[illegible]

[illegible]

35247

JEROME KRIVIT, a minor, by Sam Krivit, his father and next friend,
Appellee,

vs.

BORDEN'S FARM PRODUCTS CO. OF ILLINOIS, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

263 I.A. 643

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment against it for $13,000 entered upon the verdict of a jury in an action seeking compensation for personal injuries to Jerome Krivit, a minor.

The declaration was filed alleging joint ownership by and joint negligence in the operation of a horse drawn vehicle of nine defendants, namely, The Borden Company, a corporation, Borden Ice Cream Company, a corporation, The Borden Sales Company, a corporation, Borden's Butter & Eggs Company, a corporation, Borden's Condensed Milk Company of Illinois, a corporation, Borden's Confectionery & Food Company, a corporation, Borden's Dairy Company, a corporation, Borden's Farm Products Company of Illinois, a corporation, and Borden's Premium Company, a corporation. All except the defendant Borden's Farm Products Company of Illinois filed a plea of non-ownership and operation. The Farm Products Company admitted ownership of the vehicle in question but denied joint possession or operation of the same with the other defendants. The case went to trial against all the defendants named and a verdict was returned against all of them. A motion for new trial was granted to all the defendants except the Borden's Farm Products Company, and thereupon plaintiff moved to dismiss as to all the defendants except this company, which was allowed and judgment was entered against the present defendant.

THOMAS MOLVIT, a minor, by [illegible]
his father and next friend,
Appellee,

vs.

ROBERT'S FARM DAIRYMEN'S [illegible]
a Corporation,
Appellant.

Mr. Justice McCONNELL delivered the opinion of the court:

This is an appeal by defendant [illegible] from a judgment
it for $12,[illegible] entered upon [illegible] verdict of a jury [illegible]
seeking compensation for a personal injury to [illegible]

The declaration was filed on [illegible] joint negligence in the operation of [illegible] dairy
ness defendants, namely, the Dairymen's [illegible], a corporation, doing
Ice Cream Company, a corporation, and [illegible], a
corporation, doing [illegible] business [illegible]
ton's Dairymen's Milk Company of [illegible], [illegible]
Confectionery & Food Co. Inc., [illegible], [illegible]
pany, a corporation, [illegible] a corporation, and Berton's Drug [illegible]
corporation, and Berton's Drug [illegible]. All de-
cept the defendant Dairymen's Ice Cream [illegible] filed a plea of non-assumpsit [illegible]
Company admitted ownership [illegible] joint operation or operation [illegible]
The case went to trial upon [illegible] was returned against [illegible]
to all the defendants except [illegible] thereupon directed a [illegible]
cept this defendant, [illegible] against the defendant [illegible].

The declaration alleged that on September 28, 1929, plaintiff was struck and injured by a horse drawn vehicle upon a public highway in Chicago; that this was caused by the negligence of the defendants generally and in leaving the horse without securely fastening it in violation of an ordinance.

The accident happened in an alley which runs north and south between Lotus avenue on the west and Long avenue on the east, in Chicago. Plaintiff's theory is that a horse with a milk wagon owned by defendants ran away and galloped northward in the alley, with no driver on the wagon, and ran over plaintiff who was standing on the west side of the alley. Defendant says the horse did not run away; that it was standing still when plaintiff fell from his bicycle under the horse's feet.

Plaintiff says he was leaning against a garage on the west side of the alley and saw a horse come running and "it threw me down." His mother testified much to the same effect, although from her position at the time it was highly improbable that she could see the things to which she testified. Another witness testified to a runaway black horse, although it seems to be undisputed that the horse of defendant was a roan. He places the horse when it stopped at a point which is contradicted by all the other witnesses on both sides. Another witness testified on plaintiff's behalf but admitted he was not paying a great deal of attention to what was going on; that he was "minding his own business."

As opposed to this, the testimony of the driver of defendant's wagon was that he was headed north; that he had pulled up on the east side of the alley and stopped immediately behind a Bowman milk wagon which was also stopped; that he was still on his wagon and talking to the driver of the Bowman wagon, who suddenly grabbed the right front wheel of defendant's wagon

[illegible]

and the witness saw plaintiff on a bicycle lying behind his horse's hind feet; that he took the child from this position and carried him into the Krivit apartment. The driver of the Bowman wagon corroborated this in everyparticular, saying that while he was talking to defendant's driver, who was on defendant's wagon, he noticed the horse give a slight jerk, looked down and saw the plaintiff on the ground near the front wheel and grabbed hold of the right front wheel to keep the wagon from running over him. Four other witnesses gave believable testimony tending to corroborate defendant's version, all saying that there was no runaway horse in the alley that morning.

While a court of review is reluctant to set aside the verdict of a jury, yet, where after giving consideration to the variant stories of the witnesses it is of the opinion that the verdict is clearly against the weight of the evidence, it is its duty to set it aside and reverse the judgment. "A performance of this duty is absolutely essential for the preservation of the rights of citizens and property owners." C. & E. R. R. Co. v. Meech, 163 Ill.305. Many other cases might be cited in support of this well recognized principle. In view of the uncertain and in some respects contradictory testimony of plaintiff's witnesses and the very definite and positive statements of defendant's witnesses that defendant's horse did not run away that morning but that it with the wagon was standing still at the time of the accident, we find that the verdict is clearly against the weight of the evidence and that the judgment must be reversed.

It should be noted that in plaintiff's second, third, fourth and fifth counts of his declaration it was alleged that plaintiff was riding along the alley upon a bicycle. Plaintiff not only did not prove that he was riding on a bicycle, but evidence

and the witness saw plaintiff [illegible] and [illegible] blind fear; that he took the [illegible] and [illegible] him into the civil court [illegible] corroborated this in every particular. [illegible] to determine [illegible] horse give a slight jerk, [illegible] ground near the front wheel and [illegible] wheel to pass the wagon from [illegible] have followed testimony [illegible] all saying that the [illegible] ing.

This [illegible] verdict of a jury, [illegible] variant stories of the witnesses [illegible] is clearly against the weight of the evidence, [illegible] not it [illegible] is absolutely essential [illegible] vance and property [illegible] many other cases might be cited in support of the well recognized principle. In view of the [illegible] torn testimony of plaintiff [illegible] positive statements of [illegible] did not run away that [illegible] ing still at the [illegible] clearly against the weight of the evidence and that the judgment must be reversed.

[illegible]

Third, fourth and fifth [illegible] that plaintiff was riding along [illegible] not only did not [illegible] [illegible]

was given on his behalf tending to deny this.

Various errors are alleged which doubtless will not occur on another trial. At the close of plaintiff's case several motions were made by defendants respectively to instruct the jury to find each not guilty. In view of the undisputed evidence that none of the defendants except the Borden's Farm Products Company either owned or operated the horse and wagon in question, it was error of the court to overrule these motions as to these defendants other than the instant defendant.

Rose Krivit, wife of Sam Krivit, who sued as next friend to the plaintiff, was a competent witness. I.C.R.R.Co. v. Becker, 119 Ill. App. 221; Ullrich v. Chicago City Ry. Co., 184 Ill. App. 538.

Apparently there was an attempt made to read in evidence or get before the jury a statement written by the brother of the attorney for the plaintiff in connection with the cross-examination of the witness Chernin. Such a statement was not evidence and was inadmissible.

It was error to admit a certified list of corporations filed in Springfield. This list had no relevancy to the accident in question. None of them denied their corporate existence and the only purpose was apparently to impress the jury with the large number of corporations claimed to be involved.

Criticism of plaintiff's given instruction No. 3 is in point. While it is obvious that there was a clerical error in copying the last four lines, yet it left the instruction in an unintelligible condition.

There was no allegation or proof that the father had assigned his right to recover for plaintiff's wages during the minority of plaintiff, and the court therefore should have given defendant's refused instruction No. 1, which was to the effect

was given on the Danzig [illegible] 1939 [illegible].

Various courses [illegible] which [illegible] will not occur or another trial. [illegible] motions were made [illegible] to instruct the jury to find each not guilty. [illegible] the undertaking was [illegible] none of the defendants except the [illegible] corporate company either owned or operated the [illegible]. It was error of the court to overrule [illegible] motions [illegible] more other than the [illegible].

[illegible] the trial, [illegible] friend to the [illegible], [illegible] Decker, 110 Ill. App. 411; [illegible], 111 Ill. App. 323.

[illegible] was no [illegible] dence or not before the jury [illegible] the [illegible] the attorney for the [illegible] examination of the [illegible] evidence and was [illegible].

It was error to [illegible] filed in [illegible]. [illegible] in question. [illegible] only purpose was [illegible] ber of corporations [illegible].

[illegible] in point. While it [illegible] copying the last [illegible] unintelligible [illegible].

[illegible] excluded his [illegible] minority of [illegible] defendants [illegible].

that the jury should exclude from its consideration "any loss or impairment of earning power of Jerome Krivit, if any, during his minority." Richardson v. Nelson, 221 Ill. 254.

Defendant's refused instruction No. 2 reads:

> "The court instructs the jury that if you believe from the evidence in this case that the horse and wagon were standing still at the time and immediately before the accident and that the driver was in the wagon at the time, then and in that case, the plaintiff cannot recover."

It is a well settled rule that either party has the legal right to have the jury instructed on its theory of the case. The defense was that the horse and wagon were standing still at the time of the accident. This was the vital point in the case, and the refusal to give the instruction was reversible error. Chicago Union Traction Co. v. Browdy, 206 Ill. 615.

Complaint was made that plaintiff's counsel made improper comments in arguments to the jury. Some of these are undoubtedly improper. He told the jury with reference to the instructions that they were "nothing." Referring to a witness who had testified for defendant as "a man whose business it is to defeat such accidents as this - a man who has been paid by The Borden Company for 25 years and who has been living on these unfortunate little children who are accidentally injured," and that his evidence was "all cooked up." There were other respects in which the argument was highly improper.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

that the jury should [illegible]

importance of [illegible]

minority. [illegible]

[illegible]

> "the court [illegible]
> [illegible]
> [illegible]
> [illegible]
> [illegible]
> plaintiff cannot recover.
>
> [illegible]

legal right [illegible]

The [illegible] was [illegible]

of the society. [illegible]

[illegible] to give the [illegible]

Treating [illegible]

[illegible]

proper [illegible]

doubtful [illegible]

structures [illegible]

[illegible]

[illegible] 68 years old [illegible]

who are [illegible]

up." [illegible]

highly [illegible]

[illegible]

and the [illegible]

[illegible]

35272

FRED L. ZIMMERMAN,
Appellee,

vs.

JULIA E. ZIMMERMAN,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

237

263 I.A. 644

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant filed her petition in the above entitled cause asking for a rule on the complainant to show cause why he should not be attached for contempt for failure to make six payments of $40 each for support and maintenance of an only child as provided for in a decree of divorce. After hearing, which was largely informal in character, the court denied the relief sought, and petitioner by this appeal seeks a reversal.

The original bill was filed by the complainant, Fred Zimmerman. Defendant filed a cross-bill alleging desertion. Upon hearing in May, 1926, complainant presented no evidence in support of his bill, which was dismissed, and apparently did not contest defendant's cross-bill. The decree of divorce was entered giving the wife the custody of a minor son, then nearly thirteen years of age, and provided that the husband should turn over to the cross-complainant certain stocks and cash in full discharge of permanent alimony; also that he should pay her $75 a month for a period of twenty-four months for the support and maintenance of the child and after that at the rate of $40 a month until said child became self-supporting or attained majority. It was further ordered that he should pay to the cross-complainant "all the tuition fees for the minor child while he is attending school or college and provide him with all necessary clothing."

The petitioner alleged that there was $240 due her

35272

FRED L. ZIMMERMAN,
Appellee,

vs.

JULIA E. ZIMMERMAN,
Appellant.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

[illegible]

cause arising for a rule on the [illegible] may
should not be set aside for [illegible] on [illegible] six month-
ments of $10 each for [illegible] of [illegible] child
as provided for in a decree of divorce, which [illegible]
largely informal in character, [illegible] marital rights
and relations by this [illegible] .

[illegible]

Zimmerman. [illegible] on
hearing in July, 1935, [illegible]
of his bill, which was dismissed, [illegible]
defendant's cross-bill. [illegible]
the wife the custody of a minor son, [illegible]
age, and provided that [illegible] to the
complainant certain [illegible]
alimony; also that he should [illegible]
twenty-four months for the [illegible]
and after that at the [illegible]
multiple orders or [illegible]
he should pay [illegible]
the minor child [illegible]
his wife all necessary [illegible] .

[illegible]

under the provisions of the decree and unpaid. Respondent by answer admitted that he had paid nothing since August 1, 1930, and asserted that petitioner was not entitled to said payments for the reason that the minor child was not living with petitioner; that during the time he lived with the mother respondent paid for his tuition and clothing, but the boy had entered the University of Wisconsin and that petitioner consented to this; that respondent had paid $900 for the boy's expenses, including clothing, board and room, while at the University of Wisconsin, and that the total expenses of the boy for the school year would be approximately $1250. Respondent said he was willing to pay the $40 a month when the boy was with his mother, but asserted that he could not pay the boy's expenses at college and also pay $40 a month to the mother; that if the boy had attended college in Chicago and lived with his mother, respondent would have paid her the amount called for by the decree.

The chancellor was of the opinion that the decree did not contemplate that the respondent should pay all the expenses of the boy while at college away from Chicago and in addition pay the petitioner $40 a month for his support. He, therefore, ordered the respondent to pay $60 for the month of August and the first half of September, while the minor was at home with his mother, and that during the time while he was at home and until he became self-supporting respondent should pay $50 a month to petitioner for the support of the boy.

We are of the opinion that the conclusion of the chancellor, under the circumstances, was proper and fair to all parties. The decree for paying petitioner $40 a month clearly contemplated residence of the child with his mother and these payments were to defray the cost of his support and maintenance

under the [illegible] time of the [illegible] [illegible] answer [illegible] [illegible] and [illegible] [illegible] for the reason that the [illegible] [illegible] that during the [illegible] [illegible] his tuition and clothing, but the [illegible] [illegible] of Wisconsin and [illegible] [illegible] had paid $800 for the boy's [illegible], [illegible] and room, which is the University of [illegible] [illegible] expenses of the boy for the school year [illegible] $1200. Respondent said he was willing [illegible] the boy was with his mother, but [illegible] the boy's expenses at college [illegible] mother; that if the boy had [illegible] with his mother, [illegible] for by the degree.

[illegible] not contemplated [illegible] the boy while [illegible] petitioner [illegible] free content to [illegible] of [illegible] that during the time [illegible] self-supporting [illegible] for the support of [illegible]

[illegible] guardian, [illegible] parties. [illegible] contract [illegible] payments were to depend [illegible] of his support [illegible]

while at home. When, with the consent of all parties, the boy went to college in another state, the reason for paying petitioner the monthly payments ceased. The boy no longer lived with his mother and she was completely relieved from the expenses of supporting him. The father in assuming the expenses of the boy's stay in the college at Wisconsin paid a much larger amount than he would have been required to pay had the boy remained at home. This increase is estimated at approximately $890 for the college year. The chancellor ordered that while the boy was home on vacation the respondent should pay the mother $50 a month for his support.

We agree with the very earnest argument of counsel for petitioner that it is very desirable for a child, especially during his minority, to have a permanent home, but the petitioner lived within a stone's throw of one of the leading universities of the country and if, in the opinion of the mother, the necessity for maintaining a permanent home was paramount, she should have insisted that the boy remain at home and avail himself of the advantages offered by the nearby university.

It is a well recognized principle that courts have power to make such modifications with reference to awards for the support and maintenance as the changing circumstances may require. Maginnis v. Maginnis, 323 Ill. 113; Cole v. Cole, 142 Ill. 19.

We hold that there was no abuse of the discretion lodged in the chancellor in the order entered, and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

while it lasts. [illegible], with the result [illegible] to college in another state. [illegible] monthly payments [illegible]. [illegible] and she was [illegible] relieved [illegible] him. The trouble is [illegible] the college [illegible] have been required [illegible] crease in [illegible] The chancellor [illegible] the remainder should [illegible]

We agree [illegible] for petitioner [illegible] during his minority, [illegible] lived with a [illegible] the country and it, [illegible] for maintaining [illegible] stated that [illegible] advantages [illegible]

It is a well [illegible] power [illegible] support and [illegible] Kamimura v. Kamimura, [illegible]

We hold [illegible] logical in the [illegible] [illegible]

[illegible]

[illegible]

38280

ALFRED RICH,
Appellee,

vs.

J. L. CHASE COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit for a balance claimed to be due on an employment contract, upon trial by the court had judgment for $620, from which defendant appeals.

Plaintiff claimed that he was employed by defendant as a salesman for a period of six months commencing February 3, 1930, and ending August 2, 1930, with a $50 a week drawing account; that he complied in every respect with the contract of employment, but defendant refused to pay him the drawing account after April 3, 1930; that on April 29th defendant refused to permit plaintiff to remain in its employ any longer, although he was ready and willing to do so; that defendant breached the contract and therefore plaintiff seeks damages. The affidavit of merits asserted that on or about April 5th plaintiff and defendant agreed to terminate the theretofore existing arrangement and that plaintiff agreed to work only on a commission basis; that about May 7th plaintiff advised defendant that he would no longer work for it. Although this affidavit was made by the president of the defendant, who was its principal witness, yet no evidence whatever was tendered to support these defenses.

Defendant in this court first asserts that there was no agreement between the parties. The record does not support this contention. The written agreement appears in a letter dated January 30, 1930, written by defendant and signed by its president.

55250

ALFRED RICE, Appellee,	
vs.	[illegible]
I. L. [illegible] COMPANY, Appellant.	[illegible]

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit for a balance claimed to be due on an employment contract, upon trial by the court had judgment for $[illegible], from which defendant appeals.

Plaintiff claimed that he was employed by defendant as a salesman for a period of six months commencing February 3, 1930, and ending August 3, 1930, with a [illegible] monthly; that he complied in every respect with the contract of employment, but defendant refused to pay him the [illegible] accounts after April 3, 1930; that on April [illegible] defendant refused to permit plaintiff to remain in its employ any longer, although he was ready and willing to do so; that defendant breached the contract and thereby plaintiff sustained damages. The difficulty in [illegible] on or about April 5th plaintiff and defendants agreed to terminate the [illegible] existing [illegible] and that plaintiff agreed to work only on a commission basis; that about [illegible] defendant that he would no longer [illegible] it. Although this affidavit was made by the president of the [illegible], the [illegible] principal witness, yet no evidence [illegible] to support these defenses.

Defendant in its court files [illegible] there was no agreement between the parties. The [illegible] not support this contention. The written [illegible] bearing a letter dated January 30, 1931, written by defendant and [illegible] by its president.

Plaintiff's acceptance was evidenced by his starting to work and the payments made by defendant for a time in accordance with the terms of the written proposition.

The difference between the parties seems to have arisen from the fact that plaintiff did not produce a sufficient volume of business to satisfy the defendant. Plaintiff testified that after he had worked for four months, during which time he had received his $50 a week drawing account, he was told by Mr. Feingold, defendant's president, that business was bad and that defendant could not afford to pay him the drawing account, but wanted him to stay on a commission basis solely. Plaintiff declined to do this, stating that defendant had made a contract and requested that the agreement made should be observed; that Fiengold told plaintiff he would not pay him and told him to turn over his samples and photographs. Plaintiff further testified that he looked for a job until July 7th and finally secured other employment.

It is argued that defendant was not obligated to pay plaintiff $50 a week drawing account regardless of the amount of business brought in by him. We do not so construe the contract. In it defendant agrees to allow plaintiff $50 a week drawing account for six months and "if at the end of the six months you have not earned the $50.00 and we deem it advisable to terminate the contract, we shall be at liberty to do so." Then follows a provision as to commissions; then this, "We will pay about the tenth of the month all commissions due you and all and above your drawing account." This indicates clearly that plaintiff was to receive a drawing account without reference to the volume of business obtained.

The evidence further shows that one of the reasons given to plaintiff by Feingold for wishing to terminate the

Plaintiff's acceptance was evidenced by his starting to work and the payments made by defendant for a time in accordance with the terms of the written proposition.

The difference between the parties seems to have arisen from the fact that plaintiff did not produce sufficient volume of business to satisfy the defendant. Accordingly, testified that after he had worked for four months, [illegible] he had received his $50 a week drawing account, as was told by Mr. Garrigold, defendant's president, that [illegible] defendant could not afford to pay his drawing account, but wished him to stay on a commission basis only. Plaintiff declined to do this, stating that defendant had made a contract and requested that the agreement made should be observed; that thereupon plaintiff he would not pay him and told him to turn over his samples and photographs. Plaintiff further testified that he looked for a job until July 7th and finally secured [illegible] employment.

It is argued for defendant that plaintiff's [illegible] plaintiff $50 a week drawing account irrespective of the amount of business brought in by him. We do not [illegible] the contract. In it defendant agreed to allow plaintiff $50 a week drawing account for six months and "if at the end of [illegible] you have not earned the $50.00 and we deem it advisable to continue the contract, we shall be at liberty to do so." [illegible] provision as to commissions [illegible]. The [illegible] the month all commissions due [illegible] your drawing account." This language clearly [illegible] to receive a drawing account without reference to the volume of business obtained.

The evidence further [illegible] of the [illegible] given to plaintiff by defendant for whom to [illegible] the

employment was that Fiengold claimed to have learned that plaintiff was not devoting all his time to defendant's line of goods. Plaintiff testified that he did not handle any other line of business besides that of defendant. That he was diligent in serving the defendant is indicated by certain lists of calls he made upon parties on behalf of defendant; they average twelve or more calls a day.

The trial court could rightly conclude that the only reason for discharging plaintiff was that he did not bring in a sufficient amount of business. This under the terms of the contract would give the defendant the right "at the end of the six months" to terminate the contract. If it terminated the contract before that time, it was obligated to pay plaintiff the amount agreed upon as a drawing account in addition to any commissions.

The judgment was proper and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Hatchett, J., concur.

employment [illegible] was not terminated [illegible] Plaintiff testified [illegible] mere [illegible] the [illegible] parties on [illegible] a day.

[illegible] reason for discharging [illegible] sufficient amount of [illegible] trust would give the [illegible] months [illegible] before [illegible] agreed upon as a [illegible] amount [illegible]

[illegible]

O'Connor, [illegible]

35289

PAUL BOIJKE,
Appellee,

vs.

MARY S. FINLEY and GEORGE McPHILLIPS,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, claiming to have been struck by an automobile owned by defendant, Mary S. Finley, and negligently operated by her son, defendant George McPhillips, upon trial had a verdict for $1500. From the judgment thereon defendants appeal.

Defendants argue that the evidence does not support the verdict. The record is somewhat obscure as to how the accident happened but, as we must reverse the cause for a conclusive reason subsequently stated, we shall not narrate the facts as to how the accident happened.

It was stipulated that the car which defendant George McPhillips was driving at the time was owned by the other defendant, Mary S. Finley, his mother; that he was an adult son and operating the car at the time for the purpose of taking his girl riding with the full permission and consent of his mother. Under the decision in the recent case of White v. Seitz, 342 Ill. 266, it must be held that under such circumstances the mother who owned the car cannot be held liable for damages caused by its negligent operation by her son.

Plaintiff in his brief concedes this, but asks the court to remand the cause to the trial court with directions to render a judgment on the verdict against the defendant, George McPhillips, with leave to plaintiff to dismiss Mary S. Finley out of the case. We are cited to no precedents to support the proposition that upon reversal in this court we have power to order the lower

38288

PAUL BOLTZE,

Appellee,

vs.

MARY E. FINLEY and [illegible] Corporation,
Appellants.

[illegible]

MR. JUSTICE [illegible] delivered the opinion of the court:

Plaintiff, claiming to have [illegible] by [illegible] on-bile owned by defendant, Mary E. Finley, [illegible] negligently operated by her son, defendant George Phillips, upon trial [illegible] a verdict for $1500. From the judgment thereon defendants appeal.

Defendants argue that the evidence does not support the verdict. The record is material where [illegible] in our opinion [illegible] manifest, as we must regard it, a [illegible] evidence [illegible] substantially, [illegible] in view the [illegible] conflicts discussed.

It was alleged [illegible] Mary E. Finley [illegible] George Phillips was driving, at the time [illegible] the latter defendant, Mary E. Finley, the owner; [illegible] the car [illegible] the [illegible] with the full permission and consent of the owner. Under the pleading in the record can [illegible] Phillips v. Mills, [illegible], it must be held that under such circumstances [illegible] be held liable for damages [illegible] by her son.

[illegible] in the trial court [illegible] court to [illegible] tender a judgment in [illegible] Phillips, [illegible] the case. We are [illegible] to be [illegible] that upon reversal in [illegible] to order the [illegible]

court to enter judgment against one of two or more defendants who is seemingly liable. The cases cited by plaintiff hold that after verdict and before judgment plaintiff may dismiss as to one defendant, but this was not done here and plaintiff took judgment against both defendants, who appeal to this court. It is a well settled rule that a judgment against two defendants is a unit and cannot be reversed as to one and affirmed as to the other. Nordhaus v. Vandalia R. R. Co., 242 Ill. 166. In Seymour v. Richardson Fueling Co., 205 Ill. 77, the rule is again stated with many citations. We must either affirm or reverse as to both defendants and cannot reverse as to one and enter an order which would be equivalent to an affirmance against the other.

We must therefore reverse the judgment and remand the cause.

REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

court to enter judgment against one of the co-obligors, the [illegible] is seemingly liable. The cases cited [illegible] that either vertical and [illegible] judgments [illegible] [illegible] -ment, but this was not [illegible] [illegible] against both defendants, [illegible] appeal to this court. [illegible] settled rule that a judgment against two [illegible] is a nullity and cannot be reversed on [illegible] and affirmed as to the other.

<u>Hordhuse v. Vandalia R. R. Co.</u>, 219 [illegible] 1[illegible]. [illegible] <u>Richardson Printing Co.</u>, 203 Ill. 27[illegible] [illegible] many citations. We must either affirm or reverse as to both defendants and cannot reverse as to one and affirm as to the other [illegible] would be equivalent to an affirmance as to both [illegible].

We must therefore reverse the judgment [illegible] the cause.

Reversed and remanded.

O'Connor, P. J., and Scanlan, J., concur.

35167

NORMAL WET WASH LAUNDRY COMPANY,
a Corporation,
Appellee,

vs.

ZURICH GENERAL ACCIDENT AND LIABILITY
INSURANCE COMPANY, LIMITED, of
Zurich, Switzerland, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

Abstract 644

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The Insurance company has perfected this appeal from a judgment in the sum of $612.56 entered upon the finding of the court. The statement of claim averred an agreement on the part of defendant to indemnify plaintiff from loss by robbery within plaintiff's place of business at 7432 South State street, Chicago; that on January 10, 1929, a robbery was committed there "while there was present on duty in the premises a custodian of the insured as provided for under Section (b) of item 6 in said policy of insurance;" that plaintiff complied with all of the provisions of the insurance policy pertaining to the notice and proof of loss; that payment had been requested but defendant refused to pay.

The affidavit of merits denied that the robbery was committed in the place of business of the plaintiff "while there was present on duty in the premises of the plaintiff a custodian as provided for under Section 'b' of item 6 in the said policy of insurance." The affidavit also denied that the insurance policy covered plaintiff for the robbery which was alleged to have occurred on January 10, 1929, and denied that defendant was indebted to or owed plaintiff under the policy of insurance.

Defendant contends that the finding and judgment of the court is incorrect and that the same should be reversed with a finding of facts, and this is the controlling question in the

[illegible]
a Corporation,
[illegible]

[illegible]

SUDZEN CHARLES [illegible] v. [illegible]
INSURANCE COMPANY, [illegible], of
Burlington, Wisconsin, a Corporation,
[illegible].

[illegible]

MR. JUSTICE [illegible] delivered the opinion of the court.

[illegible]

a judgment in the sum of [illegible] in favor of [illegible] court. The statement of claim [illegible] of defendant in [illegible] plaintiff's place of business at [illegible] that on January 10, 1939, a [illegible] there was present on duty in the [illegible] owned or rented [illegible] insurance;" that plaintiff [illegible] the insurance policy [illegible] that payment had been [illegible]

The [illegible] committed in the place of business [illegible] was present on duty in the [illegible] as provided for under Section [illegible] of insurance." The [illegible] covered plaintiff for the [illegible] carried on January 10, 1939, and [illegible] to or owed plaintiff or the [illegible].

[illegible] the court is [illegible] and [illegible] a finding of fraud, and [illegible]

case.

There is no dispute as to the actual facts. It was stipulated upon the trial that the issue between plaintiff and defendant is whether when the loss occurred there was at least one custodian present on duty in the premises as required by section "b", item 6, of the insurance policy.

The policy was received in evidence by stipulation. It provides that the Insurance company "does hereby agree with the Assured named and described as such in Item 1 of the Declarations forming part hereof, as respects property described in Agreements 1 and 2 and in Item 6 of the Declarations, and stated in said Item 6 to be insured under this Policy as follows: ***" Under the heading of "Robbery Within Premises," the policy provides:

> "To Indemnify the Assured (if insurance is provided under Section (b) of Item 6 of the Declarations but not otherwise) FOR LOSS OF OR DAMAGE TO MONEY AND SECURITIES AND MERCHANDISE usual to the business of the Assured stated in Item 4 of the Declarations, and furniture, fixtures and other property (except plate glass and lettering and ornamentation thereon), occasioned by ROBBERY OR ATTEMPT THEREAT, committed during the hours specified in said Section (b), WITHIN the Assured's premises, and for damage so occasioned to said premises, provided the Assured is the owner of said premises or is liable for such damage."

The policy defines the terms "robbery," "property" and "custodian" as follows:

> "'Robbery' as used in this Policy shall mean a felonious and forcible taking of property: (a) by violence inflicted upon a custodian having the actual care and custody of the property at the time or by putting such custodian in fear of violence; or (b) by an overt felonious act committed in the presence of a custodian and of which such custodian was actually cognizant at the time; or (c) from the person or direct care and custody of a custodian, who, while having custody of property covered hereby has been killed or rendered unconscious by injuries inflicted maliciously or sustained accidentally. *** 'Property' as used in this Policy shall mean Money and Securities as herein defined and Merchandise such as is commonly carried in the business described in Item 4 of the Declarations. 'Custodian' as used in this Policy shall mean: (1) the Assured, if an individual; (2) a member of the firm, if the Assured is a copartnership; (3) any officer of the Assured, if the Assured is a corporation; (4) any person (not a watchman or porter) not less than seventeen nor more than sixty-five years of age, who is in the regular employ of the Assured and duly authorized by the Assured to act as paymaster,

case.

[illegible]

action [illegible]

Fredman [illegible]

curtailing [illegible]

"Pa", item [illegible]

[illegible]

It provides that the [illegible]

assured [illegible]

Fremin [illegible]

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ing [illegible]

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"For [illegible]
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in [illegible]
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[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

messenger, manager, cashier, clerk or salesperson, and while so acting to have the care and custody of property covered hereby."

Under the heading, "Limit of Liability" it is stated:

"The liability of the Company under this Policy is limited to the amounts of insurance specified in Sections (a) and (b) of Item 6 of the Declarations and, subject to the amount of insurance specified for each Section, the total liability of the Company is limited to the total amount of insurance specified in Section (c) of said Item 6."

Under the heading, "Declarations" are stated the name of plaintiff, its place of business, the portion of the building occupied, the business conducted, and the policy period. Under the heading, "Description of Money and Securities and Property and Premises Insured" appears the following:

"** Section (b) Money and Securities, as defined in Condition A, and Merchandise usual to the business of the Assured stated in Item 4 of the declarations and furniture, fixtures and other property, and damage to premises, insured in accordance with Agreement 2 (Robbery within premises), during the hours beginning at six o'clock A. M. and ending at twelve o'clock P. M., within the policy period."

Opposite said section "b" appears this statement:

"Insurance applying while there is at least one Custodian present on duty in the premises. $2000.00. Premium $34.65."

Such are the material parts of the policy.

The evidence as to the circumstances under which the loss occurred appears from the testimony of defendant's president, Jacob Brown, who was the only witness in the case. He says that his company has been in the laundry business for eleven years last past; that on the day in question he went to the premises at seven-thirty in the morning and remained there until six-thirty in the evening, when he left for home, leaving "another man" in the plant; that he went to 64th and Morgan streets, where an automobile bumped into the fender of his car; that when he passed 63rd street this same automobile ran in front of him, put him to the curb and called out, "Look what you have done to my car," and "Open the door." The witness opened the window a little and was talking with this man when another man on

[illegible] messenger, [illegible] counter, [illegible] [illegible] [illegible]

his left side informed him that it was a "stick-up." Three men then got into the car with the witness and took him back to 74th street and Wabash avenue. They hit him and demanded that he give them the keys of the laundry. These three men then drove him over to the laundry and stopped his car in the place at which it was usually parked. They opened the door with the key the witness gave them, took him inside and told him to open the safe. When he suggested that he was not able to do so a gun was put to his head and they threatened to blow his brains out. He tried five or six times to open the safe and then told the robbers that he could not do it. One of the robbers then took a piece of paper with the combination on it from the pocket of the witness and watched him to see that he worked the combination. The witness then opened the safe and one of the men took the money out of the box. The robbers then took the witness to a rear room, put him on a table and asked him for a rope. He told them he did not have any, whereupon they tied his hands with towels and left him lying there for about ten minutes. The witness was on the premises with the robbers for about an hour and a half. It took him about three-quarters of an hour to open the safe. The robbers had a gun at the back of Brown at all times and at no time was he away from them at any considerable distance. When he felt sure the robbers were gone, at about seven-thirty to eight o'clock, he called the police.

This is all the evidence that was offered. At the close of the evidence the Insurance company moved the court to find the issues for it, but the motion was denied, and the finding and judgment entered as hereinbefore stated.

Defendant argues in the first place that under the plain and unambiguous provision of the policy, in order that liability may attach, a custodian must be present on duty, free,

his left side informed him that it was a "hold-up." [illegible] then got into the car [illegible] on to Tenth street and [illegible] to give them the keys of the building. [illegible] drove him over to the laundry [illegible] which it was usually parked. [illegible] witness, [illegible] the door. When he suggested that he was not able to [illegible] his head and they threatened [illegible] He tried five or six times to open the safe [illegible] he could not do it. [illegible] with the combination [illegible] watched it to see that he [illegible] opened the safe and one of [illegible] the money out of the box. The robbers then took [illegible] on a table and asked him for [illegible] not have any, whereupon they tied his hands with towels and left him lying there for about ten minutes. [illegible] the robbers [illegible] quarters of an hour to open the safe. [illegible] the back of Brown [illegible] at any [illegible] robbers were gone, at about seven-thirty [illegible] he called the police.

That is [illegible] At the close of the evidence [illegible] to find the issues for [illegible] and judgment entered [illegible]

Defendant argues [illegible] plain and unambiguous provisions of the policy, [illegible] liability [illegible]

and in a position to perform the duties of his employment, and that this plain and unambiguous provision of the contract of insurance can have but one construction. There is no doubt that the president of the company, if present and free to act, was a custodian within the meaning of the contract, and there is no doubt of his presence on the premises at the time the robbery occurred. The robbers themselves saw to that, but while he was present physically he was not free mentally or physically. There was an obligation or duty upon him to protect the property of his corporation, but he was not in a condition where he could exercise his own volition in that respect at any time just before or during the robbery.

The second division of this court has recently decided a case, which seems to be "on all fours" with this one - Milkes v. U. S. Fidelity & Guaranty Co., 257 Ill. App. 65. The opinion of the court was by Mr. Justice Barnes and it states:

> "That there was a robbery within the premises and property taken of the kind which would render the insurer liable if at the time thereof the custodian was on duty within the premises, is not open to question. But while at the time of the robbery he was within the premises, it cannot be said that he was then 'on duty.' It was not enough that he intended to be on duty, or would have been had he not been deprived of his freedom before and after he entered the building where his duties as such were to be exercised. Had he been already in the building on duty before being deprived of his freedom and brought therein under duress, a different state of facts would be presented. But the provision in question plainly contemplates that he should be in the building in the exercise of his duty or in a position to exercise it at the time of the robbery. But he had been deprived of his freedom and power to exercise such duty from the time he came under the control and domination of the robbers outside of the building until he was released several hours afterwards. Under that state of facts we do not think that it can reasonably be said he was 'on duty' within the intendment of the policy, when the robbery took place."

In H. & S. Pogue Co. v. Fidelity & Casualty Co., 299 Fed. Rep. 243, there was a provision in a policy of insurance that the policy should not attach if there was but one adult person "present on duty" in the premises at the time the loss occurred.

and in a position to perform the duties of his employment, and that this plain and unambiguous provision of the contract of insurance can have but one construction. There is no doubt that the president of the company, if present and free to act, was a custodian within the meaning of the contract, and there is no doubt of his presence on the premises at the time the robbery occurred. The robbers themselves saw to that, but while he was present physically he was not free mentally or physically. There was an obligation or duty upon him to protect the property of his corporation, but he was not in a condition where he could exercise his own volition in that respect at any time just before or during the robbery.

The second division of this court has recently decided a case, which seems to be "on all fours" with this one - Hilliard v. U. S. Fidelity & Guaranty Co., 207 Ill. App. 65. The opinion of the court was by Mr. Justice Barnes and it states:

> "That there was a robbery within the premises and property taken of the kind which would render the insurer liable if at the time thereof the custodian was on duty in the premises, is not open to question. But while at the time of the robbery he was within the premises, it cannot be said that he was then 'on duty.' It was not enough that he intended to be on duty, or would have been had he not been deprived of his freedom before and after he entered the building where his duties as such were to be exercised, had he been already in the building on duty before being deprived of his freedom and brought thereon under duress, a different state of facts would be presented. But the provision in question plainly contemplates that he should be in the building in the exercise of his duty or in a position to exercise it at the time of the robbery. But he had been deprived of his freedom and power to exercise such duty from the time he came under the control and domination of the robbers outside of the building until he was released several hours afterwards. Under that state of facts we do not think that it can reasonably be said he was 'on duty' within the intendment of the policy, when the robbery took place."

In H. & E. Payne Co. v. Fidelity & Casualty Co., 209 Ied. Rep. 243, there was a provision in a policy of insurance that the policy should not attach if there was but one adult person "present on duty" in the premises at the time the loss occurred.

In that case entrance to the premises was effected by burglars in the afternoon when there was but one watchman present, who was at once blindfolded and tied to the chair. When the other watchman appeared later, he was likewise blindfolded and tied, so that at no time were there two employees of the plaintiff present on the premises who were capable of performing their duties. The court said that the purpose of the requirement of the presence of two employees was clearly defeated if the one had been wholly deprived of his freedom and volition before the other arrived, and held the plaintiff could not recover.

In Milkes v. U. S. Fidelity & Guaranty Co., supra, it appears that Fee v. Zurich Gen. A. & L. Ins. Co., 257 Ill. App. 227 (on which defendant here relies) was called to the attention of the court, but the opinion in the Milkes case states that the provision in the policy in the Fee case, on which that case turned, "is not like that in question here, yet so far as the opinion is deemed applicable we cannot agree with it." The provision construed in the Fee case seems to be similar to the provision we are asked to construe here and the cases upon the facts are very much alike. In the Fee case one Merle, who was the manager of the plaintiff's store and who carried the key and the combination of the lock, after he had returned to his home in the evening was forcibly taken therefrom by robbers to the store, where he was compelled to open the safe, and the place was robbed, plaintiff sustaining a loss of more than $4,000. The policy defined robbery as, "A felonious and frocible taking of property: by violence inflicted upon a custodian having the actual care and custody of the property at the time or by putting such custodian in fear of violence; or by an overt felonious act committed in the presence of a custodian and of

In that case entrance to the premises was [illegible] by burglars in the after-noon when there was only one watchman present, who was at once blindfolded and tied to [illegible]. When the other watchman appeared later, he was likewise blindfolded [illegible], so that [illegible] no time were there two employees on the premises at the premises who were capable of protecting their employer. The court said that the purpose of the requirement of the presence of two employees was clearly defeated [illegible] one [illegible] employee deprived of his freedom and volition below the [illegible], and the plaintiff could not recover.

In Milton v. [illegible] Holiday [illegible], it appears that Lee v. Union [illegible], 227 Ill. App. 227 (on which defendant here relied) was cited by the [illegible] of the court, but the opinion in the Milton case [illegible] the provision in the policy in the Lee case, [illegible] "is not like that in question here, yet so far [illegible] opinion is deemed applicable we can not agree with it." The provision mentioned in the Lee case seems to be similar to the provision we are asked to construe here and the cases upon the facts are very much alike. In the Lee case one Earle, who was the [illegible] and who carried the key [illegible] the location of the lock, [illegible] returned to his home in the evening, was first by [illegible] by robbers to the store, where he [illegible] and the place was robbed, plaintiff having in [illegible] than $4,000. The policy defined robbery as "a violent and forcible taking of property by violence inflicted upon [illegible] having the actual care and custody of the property [illegible] by putting such custodian in fear of violence; or by an event tainous not committed in the presence of a custodian [illegible]

which such custodian was actually cognizant at the time." The court held the defendant Insurance company liable and a certiorari was denied by the Supreme court. We are disposed to follow Milkes v. U. S. Fidelity & Guaranty Co., 257 Ill. App. 65, and H. & S. Pogue Co. v. Fidelity & Casualty Co., 299 Fed. Rep. 243, where the phrases construed are practically the same as the one we must construe here.

Plaintiff further contends that defendant is liable, basing his theory upon the well recognized rule that policies of insurance are to be construed most favorable to the insured, and that where expressions therein are equivocal they must be interpreted most strongly against the insurer; that where doubt exists the contract must be liberally construed so as not to defeat, except by clear and certain language, the claim for indemnity; that if the insurer desires to limit or restrict its liability by a proviso, exception or limitation, such limitation or exception should be expressed in clear and unmistakable language, and that all provisos, conditions or exceptions which tend to limit the liability of the insurer, should be construed most strongly against the party preparing the contract and for whose benefit they are inserted. This court has never hesitated to apply these rules vigilantly to the end that insurance contracts may be construed to in fact insure. Applying these rules to the facts of this case, plaintiff says that condition "b" is a paragraph devoted to the exclusions of liability and condition "c" prescribes the limit of the company's liability by specific reference to the so-called declarations. It says that combining condition "a" or the definition of the policy, with agreement 2, or the insuring clause, expressed on the face of the policy above the signature thereon, defendant company agreed to indemnify plaintiff,

which such custodian was actually occupied at the time." The court held the defendant insurance co. only liable and a certiorari was denied by the Supreme court. We are disposed to follow Wilkes v. U. S. Fidelity & Guaranty Co., 327 Ill. App. 65, and Lorillard Fence Co. v. Fidelity & Casualty Co., 299 Ned. Rep. 248, where the phrases construed are practically the same as the one we must construe here.

Plaintiff further contends that defendant is liable, basing his theory upon the well recognized rule that policies of insurance are to be construed most favorable to the insured, and that where expressions therein are equivocal they must be interpreted most strongly against the insurer; that where doubt exists the contract must be liberally construed so as not to defeat, except by clear and certain language, the aim for indemnity; that if the insurer desires to limit or restrict its liability by a proviso, exception or limitation, such limitation or exception should be expressed in clear and unmistakable language, and that all provisos, conditions or exceptions which tend to limit the liability of the insurer, should be construed most strongly against the party preparing the contract and for whose benefit they are inserted. This court has never restricted to apply these rules vigilantly to the end that insurance contracts may be construed to in fact insure. Applying these rules to the issue of this case, plaintiff says that condition "b" is a paragraph devoted to the exclusions of liability and condition "c" prescribes the limit of the company's liability by specific reference to the so-called deductibles. It say that excluding condition "a" of the definition of the policy, which represents 2, or the insuring clause, expressed on the face of the policy above the signature thereon, defendant company agreed to indemnify plaintiff,

assuming unlimited and unequivocal obligation. Plaintiff in its argument, however, has not correctly quoted agreement 2, upon which it has expressly based its claim. That agreement does not show an unlimited and unequivocal agreement but the agreement to indemnify is expressly made conditional upon the fact that the same is provided under section "b" of item 6 of the declarations "but not otherwise." There is no ambiguity about this provision and plaintiff's argument goes contrary to its express stipulation as to the issue in the case. While contracts of insurance when ambiguous are to be construed most strongly in favor of the insured, where, as here, the contract is clear and unmistakable and free from doubt, it should be enforced according to the intention of the parties, just the same as other contracts. Crosse v. Knights of Honor, 254 Ill. 80; Heuer v. Westchester Fire Ins. Co., 44 Ill. App. 429; Hartford Fire Ins. Co. v. Northern Trust Co., 127 Ill. App. 356; Preston v. Aetna Casualty Co., 85 N. E. Rep. 1006; Feigenbaum v. Aetna Casualty & Surety Co., 240 Ill. App. 502; Corpus Juris, vol. 32, sec. 258, p. 1148).

There is no ambiguity in this contract, and plaintiff's argument is made plausible only by a partial ~~xxxxxxxxx~~ quotation from the agreement to indemnify.

For the reasons stated the judgment is reversed with a finding of facts and judgment here in favor of defendant for costs.

REVERSED WITH A FINDING OF FACTS
AND JUDGMENT HERE.

O'Connor, P. J., and McSurely, J., concur.

assuming multiple and unwieldy [illegible] ... ita argument, however, has not correctly [illegible] ..., some which is now commonly [illegible] ... [illegible] show an unlisted and [illegible] ... the [illegible] to indemnity is [illegible] ... [illegible] area is [illegible] "9" [illegible] ... "but not [illegible]." [illegible] and [illegible] as to the [illegible] ... [illegible] authors [illegible] ... [illegible] free from doubt, [illegible] of the [illegible] ... [illegible] <u>[illegible] of [illegible]</u>, [illegible] App. 488; <u>[illegible]</u>, [illegible] App. 316; <u>[illegible]</u>, [illegible] <u>Fairchild v. [illegible]</u>, [illegible] Corona [illegible], [illegible]

There [illegible] argument is made [illegible] xxxxxxxxxx [illegible] from the [illegible] in [illegible].

[illegible] Finding of [illegible] ...

[illegible]

O'Connor, [illegible]

35167 FINDING OF FACTS.

We find as facts that by the contract upon which plaintiff sues the liability of defendant was limited to such loss as plaintiff might sustain while there was at least one custodian present on duty in the premises of plaintiff; that at the time plaintiff sustained the loss for which it sues there was no custodian on duty in the premises, and that plaintiff therefore is not entitled to recover.

38167 [illegible]

[illegible] plaintiff were the liability of [illegible] loss as plaintiff was a [illegible] [illegible] negligence [illegible] duty in [illegible] at the time plaintiff [illegible] was no negligence on duty in the [illegible], [illegible] therefore is not entitled to recover.

35224

H. T. ROSELAND et al.,
Appellants,

vs.

BERT H. LAUDERMILK et al.,
Appellees.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

263 I.A. 644

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Complainants filed their amended bill of complaint praying for discovery, the annulment of certain releases, an accounting and general relief. Defendants demurred, and complainants electing to stand by the amended bill a decree was entered dismissing it. From that decree this appeal has been perfected.

The question for decision is whether the bill as amended stated facts which entitle complainant to relief; in other words, whether the demurrers were improperly sustained.

The bill alleges that defendant Laudermilk was a real estate broker who did business in his own name and also in the name of Bert H. Laudermilk Realty Association; that he was engaged primarily in developing and selling real estate subdivisions; that complainants are not in said business and are wholly unfamiliar therewith and inexperienced therein; that on January 28, 1927, Henry Niebuhr owned a farm of about 80 acres; that about that time Laudermilk and another defendant, Susen, entered into a fraudulent scheme, plan and conspiracy for the purpose of defrauding complainants; that Laudermilk acting through and by Susen purchased from Niebuhr this farm for a price, the exact amount of which is unknown to complainants, although it was less than $40,000; that title was taken in the name of Susen, who thereafter posed as the true owner of it; that the real ownership and interest of Laudermilk in the land was concealed; that afterwards in pursuance of a plan to defraud, Laudermilk approached com-

plainants and concealing from them the fact that he was the true owner, stated and represented to them that he was a real estate broker and experienced in subdividing; that he had arranged and could purchase this farm for the sum of $60,000, payable $30,000 in cash, the balance to be secured by mortgage; that Laudermilk solicited complainants to advance to him the money necessary to pay for the land and solicited them for authority as their agent and broker to arrange and negotiate for the purchase of the land upon these terms; that he further stated and represented to complainants, pursuant to the fraudulent plan, that upon the purchase of the land by complainants he would enter into an agreement with complainants whereby he would agree to immediately subdivide the land into lots and sell them at a substantial advance in price, and that as a result of such sale complainants would realize approximately 100% in profits annually upon their investment over a period of five years.

The bill alleges that these statements and representations were false and fraudulent and known to be such by Laudermilk; that complainants had full faith and confidence in his honesty and integrity and believed these statements to be true and relied upon them; that so relying upon the statements and having no other information or knowledge to the contrary, complainants authorized and empowered Laudermilk as their agent and broker to represent them in the purchase of the land for the price of $60,000, and that complainants paid over to Laudermilk on the purchase price certain amounts representing certain shares in the syndicate.

The bill also alleges that pursuant to the fraudulent plan, Laudermilk and Susen caused the title to the land to be transferred to the Peoples & Merchants Bank & Trust Company ostensibly in trust for the benefit of complainants; but that in truth and in fact the transfer was so arranged as to be subject to the sole

[illegible] plaintiffs and originally from [illegible] the true owner, stated and represented to [illegible] broker and experienced in subdividing; that [illegible] could purchase with them for the [illegible] in cash, the balance to be secured by [illegible] solicited complainants to advance [illegible] pay for the land and solicited them [illegible] and prayed to arrange and negotiate the [illegible] upon their [illegible] plaintiffs, pursuant to the [illegible] change of the land by [illegible] ment with complainants [illegible] divide the land into [illegible] in price, and that as a result [illegible] realize considerably [illegible] ment over a period of five years.

The bill alleges [illegible] tions were false and fraudulent [illegible] that complainants had full faith and confidence in [illegible] integrity and believed [illegible] them; that so relying upon [illegible] formation or knowledge [illegible] empowered [illegible] the purchase of the land [illegible] plaintiffs said [illegible] amounts represented [illegible].

The bill also [illegible] plan, Lauderdale and [illegible] ferred to the [illegible] in trust for the benefit of [illegible] that the transfer was or intended to be [illegible]

control of Laudermilk; that thereafter Laudermilk secretly caused the Peoples & Merchants Bank & Trust Company to convey the title of the land to Laudermilk, which conveyance was concealed by Laudermilk from complainants; that he failed to record the deed to him for more than one year after he had received it.

The bill further alleges that Laudermilk on various pretexts deferred and delayed the subdividing and sale of the land for several years and that thereafter Laudermilk stated and represented to complainants that there was no prospect of successfully subdividing and selling the land; that Laudermilk thereupon offered to purchase from complainants all interest of complainants so held by them; that complainants being in ignorance of the facts aforementioned and having no other means of knowledge and believing the statemnts and representations of Laudermilk to be true and relying upon them, conveyed their interest in the land to Laudermilk and at the same time Laudermilk induced complainants to execute various documents and instruments purporting to release Laudermilk from any and all claims and demands for an accounting or otherwise. These documents, the bill avers, were secured from complainants by false and fraudulent representations and through concealment of the true facts, and it is alleged that the same ought to be held null and void.

The bill further alleges that Laudermilk has caused the land to be conveyed by a certain declaration of trust to the Foreman-State Trust & Savings Bank as trustee, and that the bank now holds title as trustee to the land for the benefit of Laudermilk, the terms and conditions of the trust being otherwise unknown to complainants.

The bill prays that defendants may be required to answer; that Laudermilk and Susen may be adjudged to be guilty of

control of Lambertville; [illegible] the Bowlesville [illegible] the property [illegible] of the land to Hudson [illegible] conveyance [illegible] Lambertville from compulsory; [illegible] to his [illegible] [illegible].

The bill further alleges [illegible] pretexts deferred and [illegible] the condemnation [illegible] land for several years [illegible] represented to owner [illegible] successfully subdivided and sold [illegible] thereupon offered to purchase from [illegible] condemnation [illegible] of the State [illegible] and relieving the [illegible] be true and relying upon them, [illegible] land to Lambertville [illegible] plaintiffs to execute [illegible] to release Lambertville from [illegible] according or otherwise. [illegible] secured from [illegible] and through concealment of the true facts, [illegible] the same court to be held null and void.

The bill further [illegible] the land to be conveyed by [illegible] Borough-State Trust [illegible] for bona fide [illegible] milk, the terms and [illegible] known to complainants.

The bill [illegible]

Answer: that Lambertville [illegible] [illegible] of

perpetrating a fraud upon complainants; that they may be required to make a complete discovery and accounting of all their acts and doings; particularly as to those whose money was used in the purchase of the lands, what price was paid for the same, how much was paid in cash and what amount was represented by a mortgage, what contracts were executed with reference to the same; that an account be taken and that Laudermilk and Susen, or either of them, be decreed to pay and turn over to complainants such sum or sums as may be found to be justly due complainants; that the releases and discharges heretofore executed by complainants to Laudermilk may be adjudged to be null and void; that a receiver may be appointed for documents, deeds, agreements, books of account, etc.; and for other and further relief.

It is urged in favor of the decree that the allegations of fraud are not sufficient. Cases are cited holding that it is not sufficient to allege fraud generally, but that specific facts and circumstances constituting the fraud must be stated, and that these facts as stated must be sufficient to show that the conduct complained of was fraudulent. Stevens v. Collison, 249 Ill. 225, and Simpson v. Simpson, 273 Ill. 90, are cited. We do not think there is any doubt of this rule, but we are also of the opinion that the facts as here stated are sufficient to show that Laudermilk stood in a fiduciary relationship to these complainants; that he violated his duty in this respect, and that he and Susen together conspired to defraud complainants out of their money; that complainants relied upon these untrue representations and sustained financial loss through such reliance.

It is also urged that a bill for rescission which does not offer to return the consideration or to otherwise place defendant in statu quo, is subject to demurrer. There is no doubt

perpetrating a fraud upon creditors; but they may be tempted to make a complete discovery [illegible] it is to give the doings particularly as [illegible] chase of the lands, and price was paid for the same, per cent. paid in cash and what amount was transmitted by [illegible], contracts were executed with reference to the same; that no account be taken and that Lauderdale and Swann, or either of them, be decreed to pay and turn over to complainants such sum as may be found to be justly the equal shares; that the revenues and disbursements properly expended by [illegible] may be adjudged to be null and void; that [illegible] be appointed for downsville, death, resignation, [illegible] and for other and further relief.

It is urged in favor of the decree that the allegations of fraud are not sufficient. Cases are cited which [illegible] it is not sufficient to allege fraud generally, [illegible] facts and circumstances constituting the fraud and must be stated, and that these facts as stated must be sufficient to work such the conduct complained of was fraudulent. Cravens v. Hallinger, [illegible] 225, and Simpson v. Simpson, 225 [illegible], we do not think there is any doubt of the [illegible] opinion that the facts as here stated are [illegible] Lauderdale stand in a fiduciary relation [illegible] ments; that he violated [illegible] Swann knowingly [illegible] money; that complainant [illegible] and equitable [illegible]

It is also urged [illegible] does not of or to render the [illegible] defendant in this one, is a joint [illegible]

of this proposition and the cases defendants cite so hold, but here the bill is not one for rescission. The bill prays for an accounting, for discovery and for other matters, and it alleges that in order to have such an accounting it is necessary that certain releases, deeds, etc., which were fraudulently obtained, should be set aside. The relief prayed in these respects was not inconsistent. The bill is not one primarily for rescission of the contract under which complainants were defrauded, but it is for an accounting and discovery, and in order that these may be had it is necessary that the releases, etc., should be set aside.

It is suggested that the bill is multifarious, but the cases cited and relied on (namely, Conney v. Lamb, 210 Ill. 95, and First National Bank v. Starkey, 268 Ill. 22) show that the contention is without merit.

The court erred in sustaining the demurrer and in dismissing the bill, and for that reason the decree will be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

of this proposition in the court below [illegible], but here the [illegible] is not one of [illegible]. [illegible] accounting, for [illegible] that it ought to have [illegible] certain reasons, deeds, etc., [illegible] should be set aside, the [illegible] inconsistent. The [illegible] contract under which [illegible] accounting and discovery, and [illegible] necessary that the [illegible], etc., [illegible].

It is [illegible] the cases cited and relied on (Mr. [illegible]) and First National [illegible] v. [illegible], [illegible] contention is without [illegible].

The court erred in [illegible] illustrating the [illegible] versed and the cause [illegible].

[illegible]

O'Connor, [illegible], [illegible].

35269

SOBIESKI BUILDING AND LOAN ASSOCIATION,
Appellant,

vs.

JOSEPH KORCZEWSKI, WANDA KORCZEWSKI and ROMAN J. KOWALCZYKI as Successors in Trust under Trust Deed recorded in the Recorder's office of Cook County, Illinois, as Document No. 6858120,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

JOSEPH KORCZEWSKI and WANDA KORCZEWSKI,
Cross-Complainants,
Appellees,

vs.

SOBIESKI BUILDING AND LOAN ASSOCIATION,
Cross-Defendant,
Appellant.

263 I.A. 645

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The Building and loan association filed a bill to have a real estate mortgage reformed as to the description of the property thereby conveyed and for its foreclosure as reformed. Defendants Korczewskis were makers of the mortgage. They answered admitting the execution thereof to secure a loan as charged in the bill to the amount of $6000 but denied that they received that amount, and alleged that only a part of the consideration was paid to them and that complainant retained the balance for the purpose of satisfying a prior encumbrance of $3600 which had theretofore been borrowed by defendants from complainant, this prior loan being evidenced by an agreement dated March 21, 1921. The answer averred that the mortgage indebtedness had been reduced to an amount which defendants could not exactly state, but that the amount remaining due and unpaid was known to complainant; that on the date of the mortgage, June 2, 1924, defendants were paid by complainant the sum of $6000, less the amount remaining unpaid upon the $3600 encumbrance;

[illegible]

vs.

JOSEPH KOROSTYNSKI, [illegible]
ROLLAN J. [illegible]
Trial under "Full [illegible]
Receiver's office [illegible]
as Document [illegible].

JOSEPH KOROSTYNSKI and [illegible]
Cross-Defendants,

vs.

SCHIRMER BRI[illegible]
Cross-Defendant.

[illegible]

[illegible]

that at the time of the making of the $3600 loan there was another prior encumbrance on the premises to the amount of $2400, which was in the possession of the Sherman State Bank of Chicago; that complainant had full knowledge thereof; that at that time Bruno F. Kowalewski was an officer of complainant and its treasurer and a notary public, and that as treasurer and agent of complainant he deducted from the said $3600 loan sufficient money to pay the prior $2400 encumbrance and retained moneys due and owing to defendants on the $3600 encumbrance to pay off the $2400 encumbrance; that said amount was never paid to defendants or either of them, but was retained by complainant to discharge the $2400 encumbrance; that complainant converted to its own use and retained for its own benefit all the moneys withheld from the $3600 loan and refused to credit the account of defendants therewith; that if an account were taken it would be found that defendants were not in arrears or in default. The answer denied the alleged lien and the alleged indebtedness, but averred that the $2400 encumbrance was a first lien at the time the $3600 loan was made; that complainant knew this and agreed to release and discharge it and retain moneys of defendants sufficient to do so, but that it has fraudulently retained the sum with interest; that the $2400 encumbrance had not been paid; that to prevent foreclosure defendants purchased the same to protect their rights and have demanded from complainant reimbursement; and they claimed the right to be reimbursedfor the moneys with interest. They admitted the legal error in the description; alleged an accounting should be taken and offered to pay the amount due.

Defendants also filed a cross-bill setting up the proceedings to foreclose and other facts as averred in the answer; asserting that they held stock in the Building and Loan Association which had been wrongfully forfeited by complainant; praying for an

[illegible]

prior encumbrance on the property [illegible]

was in the charge [illegible]

commission and full [illegible]

Howlewent was an officer of [illegible]

notary public, [illegible]

deducted for the [illegible]

prior [illegible]

[illegible]

that said [illegible]

but was replaced [illegible]

that [illegible]

benefit all the [illegible]

credit the account of [illegible]

taken it should be found [illegible]

default. [illegible]

debtedness, [illegible]

lien at the time [illegible]

this and agreed to [illegible]

defendants [illegible]

[illegible]

been said; that [illegible]

same to [illegible]

[illegible]

money with interest.

[illegible]

the sums due.

[illegible]

proceedings [illegible]

assertion, [illegible]

[illegible]

accounting, - that the forfeiture might be set aside and for other special and general relief.

Complainant answered the cross-bill, denying its equity. The cause was referred to a master who took the evidence and reported to the effect that the equities were with the complainant, and that a decree of foreclosure should be entered as prayed in the bill; and that the cross-bill should be dismissed for want of equity.

Objections were filed by defendants and overruled by the master. By order these stood as exceptions upon the hearing before the chancellor. Exceptions Nos. 4 to 33 were sustained, and a decree was entered dismissing the bill for want of equity, granting the relief as prayed in the cross-bill, and re-referring the cause to the master to state the account. From that decree the building and loan association has perfected this appeal.

An examination of the briefs discloses that the material facts as found by the decree are not questioned as being clearly and manifestly contrary to the preponderance of the evidence, and the same would appear to be as follows:

Complainant is a corporation organized as a building and loan association under the laws of Illinois in 1908. From the time of its organization until 1925 it occupied the premises known as 1359 West 51st street, Chicago. On the same premises the real estate and loan business of Bruno F. Kowalewski was conducted. For a number of years prior to 1920 he operated a private bank. After that time this bank was incorporated under the state law as the Sherman Park State Bank. The bank and the building and loan association occupied the same premises in transacting their business. Kowalewski was one of the organizers of the association and was its treasurer from the time of its organization until his death in 1925. He was also the notary public or conveyancer of the asso-

ciation. His duties were to attend to the drawing of papers, to have the titles to property examined, to clear objections to the same and to attend to other matters of business in which the association was interested.

On or about June 12, 1920, the defendants Korczewskis through Kowalewski negotiated a loan in the sum of $2400 for a term of three years from that date, with interest at six per cent per annum, and to secure the payment of the same they executed a trust deed conveying the premises here involved to Kowalewski. The trust deed was recorded on June 16, 1920, in the recorder's office of Cook county and still remains of record unreleased. The first installment of interest on this loan which fell due in December, 1920, was paid by the defendants at the Sherman Park State Bank. In March, 1921, defendants desiring a larger loan made application to the association for a new loan in the sum of $3600. At the time of making the application Joseph Korczewski advised complainant's board of directors of the existing encumbrance for $2400. He was told by them that this loan of $2400 would be paid by the association and deducted from the $3600 encumbrance, and that the balance would be paid to the defendants. The usual committee was appointed by the association to inspect the property, and it reported favorably on the loan, which was granted on the vote of the board. The details of the loan were assigned to Bruno F. Kowalewski for attention. He prepared the necessary mortgage and agreement, examined the title to the property and afterwards reported to the board that the loan was ready for payment. Thereupon the association's check for $3600 was drawn on the Sherman State Bank and delivered to Bruno F. Kowlaewski. Shortly thereafter Kowalewski told defendant Joseph Korczewski that he was ready to make distribution and directed Korczewski to endorse the check

in blank and leave it with him, which Korczewski did. At the same time Kowalewski delivered to Korczewski his (Kowalewski's) personal check for $1,000, stating that after he had paid off the existing encumbrance, accrued interest and incidental expenses he would pay the balance.

Subsequent to this transaction Kowalewski notified Korczewski that he was ready to account for the balance of the fund and he gave Korczewski his check for $135.95 to balance.

At the time this $3600 loan was made the encumbrance of $2400 was a good and valid first lien on the property, and of this fact complainant had actual and constructive knowledge. It was the duty of Kowalewski to pay and release the $2400, but he fraudulently failed and refused to do so and converted the full amount of the loan and accrued interest to his own use to the extent of $2448.

Joseph Korczewski was of foreign birth and unable to read or write the English language. Bruno F. Kowalewski was of the same foreign nationality. They had been acquainted with each other for many years. Korczewski was a brick mason. He had had numerous transactions with Kowalewski, who had at times acted as his advisor. The decree finds that Korczewski had no knowledge of the fraud and deception practiced by Kowalewski; that Korczewski paid no further installments of interest on the encumbrance of $2400 but that these were paid by Kowalewski; that Kowalewski sold the encumbrance to one Sniegowski, and that from the date of the transfer Kowalewski paid the several installments of interest to complainant and continued to do so up to the time of Kowalewski's death in May, 1925. It was not until after the death of Kowalewski that the Korczewskis learned that Kowalewski had not paid the $2400

[illegible]

[illegible] check for $1,000, stating [illegible] encumbrances, mortgaged [illegible] the bilance.

[illegible]

Horsewell [illegible] and be [illegible].

[illegible] of 1880 was [illegible] this foot [illegible] was the date of [illegible] transfer [illegible] amount of the loan and [illegible] of 1844.

[illegible] read or write the English language. [illegible] the same foreign [illegible] other for [illegible] horseshoe [illegible] his adviser. [illegible] the Trust and [illegible] paid no [illegible] $2400 but [illegible] the mortgage [illegible] transfer [illegible] comfortable [illegible] death in May, 1913. [illegible] that the [illegible] [illegible] paid the [illegible]

encumbrance, as it was his duty to do.

In June, 1924, the Korczewskis being again desirous of increasing their loan applied to complainant for a loan of $6,000. The usual routine was adopted, and the loan was made by the association issuing and delivering to Kowalewski its check for $6000. He in turn caused Korczewski to endorse it in blank and after he received it so endorsed deposited it in his own personal account from which he drew for the various disbursements. The decree finds that at the time of making this loan the $2400 encumbrance was a valid first lien on the premises, of the existence of which complainant had both actual and constructive notice.

In the summer of 1923 when the $2400 encumbrance was about to mature Kowalewski caused the Korczewskis to execute a certain renewal agreement and extension interest notes by representing that the agreement and notes applied to other property and by concealing the fact that they pertained to this loan. The decree specifically finds that the accomplishment of this deception was aided by the facts that Burno F. Kowalewski had the full confidence of the Korczewskis and that they were unable to read or write the English language.

When Korczewski learned that Kowalewski had not paid the $2400 encumbrance and had not caused it to be released, he brought the matter to the attention of complainant and was told by complainant's officers that the matter was being investigated and that the investigation would take some time. They advised Korczewski that he should continue paying the assessment on his loan of $6000 until such time as the association could complete its investigation. Korczewski, relying on this direction, continued to pay his regular weekly installments until about November 26, 1927.

Sniegowski, the owner of the $2400 encumbrance, having

encumbrance, as it was his duty to do.

In June, 1924, the Corporation [illegible] the Kaiserhof of increasing their loan amount to [illegible] for a loan of $6,000. The usual routine was adopted, and the loan was made by the association leading and distributing to [illegible] the amount of $6000. He in turn caused [illegible] to [illegible] it to [illegible] and after he received it he [illegible] his own personal account free which he drew for the various [illegible] purposes. He denies that at the time of making [illegible] the $6000 encumbrance was a valid first lien on the premises, the existence of which complainant had both actual and constructive notice.

In the summer of 1926 when the [illegible] encumbrance was about to mature [illegible] caused the Corporation to execute a certain renewal agreement and extension [illegible] by assuming that the agreement and notes [illegible] by concealing the fact that [illegible] the [illegible]. The defense specifically [illegible] was added by the [illegible] that [illegible] the existence of the Corporation [illegible] write the English language.

Then Corporation learned that [illegible] had not paid the $5400 encumbrance and had not caused it to be released, he brought the matter to the attention of [illegible] complainant's officers that the matter was [illegible] and that the investigation would [illegible]. [illegible] advised [illegible] and that he would continue [illegible] on his loan of $6000 until such time as the [illegible] could [illegible] the [illegible]. Corporation, relying on [illegible], continued to pay the regular weekly installments until October 6, 1927.

Meanwhile, the owner of the $5400 encumbrance, having

caused a bill to foreclose to be filed, Korczewski caused complainant to be advised of the fact and demanded the payment of the amount claimed, which complainant refused to do. April 30, 1927, Korczewski caused Sniegowski to be paid the sum of $2952.02, in satisfaction of the amount then found due on the $2400 loan.

February 16, 1929, complainant passed a resolution finding defendants Korczewskis in default, forfeiting their 60 shares of stock in the association and directing the foreclosure be brought on the $6000.00 mortgage. The decree specifically finds that the defendants were not at that time in default; that before declaring a forfeiture the building and loan association should have accounted and directs that the resolution of forfeiture be vacated and set aside and that the defendants' right to membership be restored.

The decree finds that Bruno F. Kowalewski in receiving the check for $3600 endorsed by Korczewski in blank, was the agent and acted for the Sobieski Building and Loan Association, and that it was his, Kowalewski's, duty as such agent to pay to the legal holder and owner of said encumbrance the amount of principal and interest due and owing on the $2400 encumbrance, and that such duty was the duty of the Sobieski Building and Loan Association; that the failure of Kowalewski so to do was the failure of the Sobieski Building and Loan Association, and that the Sobieski Building and Loan Association ought in equity and good conscience be required to account to the defendants for the amount of $2952.02 paid and expended by them in the satisfaction of the $2400 encumbrance.

As already stated, the controlling question in the case is whether Bruno F. Kowalewski in his dealings with the Korczewskis with reference to these loans, was the agent of the

caused a bill to correctness to be filed, concerned [illegible] mere contingent to be advised of the fact and demanded the amount of the amount claimed, which complainant refused to do. April 3, 1922, Foreseeri caused disposed to be sent the sum of [illegible], in satisfaction of the [illegible] [illegible].

February 16, 1923, complainant passed a resolution finding defendants responsible in default, including loss on shares of stock in the [illegible] and directing the proceeds be brought on the [illegible] mortgage. The [illegible] specifically finds that the defendants were not [illegible] authority [illegible] before declaring a forfeiture the [illegible] of loan association should have accounted and disclose that the [illegible] of forfeiture be vacated and set aside [illegible] the defendants' right to membership be restored.

The decree finds that [illegible], [illegible] in receiving the check for $2500 endorsed by [illegible], in block, was the agent and acted for the building [illegible] and loan association, and that it was his, Sovalenski's, duty as such agent to pay to the legal holder and owner of said [illegible] the amount of principal and interest due and owing on the [illegible], and that such duty was the duty of the building [illegible] the loan association; that the failure of [illegible] to do so was the failure of the Polish Building and Loan Association, [illegible] Polish Building and Loan Association [illegible] and complainant be required to account to the [illegible] for the sum of $2500.00 paid and expended [illegible] the satisfaction of the $2400 encumbrance.

As already stated, the controlling question in the case is whether Frank J. Sowalenski in his dealings with the Foreseeris with reference to these loans, was the agent of the

complainant building and loan association or the agent of the Korczewskis. It is true, as complainant contends, that the burden of proof is upon the Korczewskis in this respect (Budinot v. Winter, 190 Ill. 394; Foreman Trust and Savings Bank v. Cohn, 342 Ill.280), but, as already stated, the facts are practically uncontradicted and the only question to be decided so far as the errors assigned by complainant are concerned, is: What was the relationship of Bruno F. Kowalewski to the parties in this transaction?

Defendants have assigned cross-errors questioning the validity of the $6000 mortgage upon the theory that because the first encumbrance of $2400 was not owned by the building and loan association, the mortgage for $6000 was contrary to the statute and invalid. Juergens v. Cove, 99 Ill. App. 156, is cited. It is true that the statute directs that in the making of loans a building and loan association should take ample real estate security unencumbered except by prior liens of the association; but it by no means follows that when an association, as here, through fraud or inadvertence of one of its agents, makes a loan of that kind, the loan is ultra vires its powers. As we understand the case of Juergens v. Cove, it holds that a loan made under such circumstances is not ultra vires the association. Under these circumstances the defendants cannot be heard to contend that the mortgage is void. On the undisputed evidence we hold that Kowalewski in disbursing the proceeds of the $3600 check and other checks was acting as the agent of complainant. He was its officer. The business of disbursing these proceeds was specifically turned over to him by the complainant association, and the association, it is apparent, relied upon him to see that its rights were protected and its directions carried out.

Complainant says that it was the duty of defendants to execute a mortgage clear of all prior liens. That is true. It was

complainant building and loan association or the agent of the foreclosable. It is true, as cited lower courts, that the burden of proof is upon the foreclosable in this case (Bushner v. Fluter, 190 III. 361; Foreman Trust and Savings Bank v. Lowe, 342 Ill. 350), but, as already stated, the facts are practically uncontested and the only question to be decided is if the errors assigned by complainant are conserved, in which case the validity of Bruno K. Kowalewski is the position in this trial matter.

Both parties have analyzed arguments concerning the validity of the $8000 mortgage upon the ground that at the time the first encumbrance of $4000 was not owned by the building and loan association, the mortgage for $8000 was contrary to the statute and invalid. Jurgens v. Lowe, 99 Ill. App. 150, is cited. It is true that the statute directs that in the making of loans the building and loan association should take ample real estate security upon mortgage except by prior items of the association; but it by no means follows that when an association, in error, through fraud or misrepresentation of one of its agents, makes a loan of such kind, the loan is void ab initio. As we understand the case of Jurgens v. Lowe, it holds that a loan made under such circumstances is not void ab initio the association. Under these circumstances the transaction cannot be based to contra - bonos mores, per a nullo. In the case disputed evidence we hold that complainant is entitled to proceeds of the $8000 check and other checks was acting as a matter of common plaintiff. He was the officer. The condition of it covering these proceeds was practically turned over to the building association, and the association, it is [illegible], relied upon the to see that its rights were protected. The fiduciaries carried out.

Complainant says that it was in [illegible] of defendants to execute a mortgage cover of all prior issue. This is true. It was

also the duty of the association to see to it that any mortgage taken by it was clear of prior liens. The association could act only through its agents and officers, and that duty was specifically intrusted to Bruno F. Kowalewski. That Kowalewski happened to have the confidence of the Korczewskis to a remarkable degree did not change or modify the authority and the duty of Kowalewski as the agent of complainant. The Korczewskis had a right to rely not only upon the actual but also upon the apparent authority of complainant's treasurer and agent to whom the distribution of the loan was entrusted by complainant. Complainant has cited authorities which, however, do not sustain its contention. One of these cases is Henken v. Schwicker, 174 N. Y. 296.

In that case a mortgagor employed a broker to secure a mortgage loan which he desired for the purpose of paying off existing mortgages on the property to be conveyed. The broker applied to plaintiff mortgagee for the loan. The mortgagee viewed and said he would grant the loan if it was to be a first mortgage. The broker assured him that it would be, whereupon the mortgagee signed and delivered his check for the amount of the loan and made payable to the order of the broker, who endorsed the check and deposited it in his account in the bank. Defendant mortgagor then went to the office of the broker to ascertain if he had the money on the loans and signed a bond and mortgage therefor. The question then arose as to the payment of the prior mortgage, and the broker testified that the mortgagor told him to pay the prior mortgages. The mortgagor did not deny this testimony. The broker took the mortgage, had it recorded and later delivered the bond and mortgage to the mortgagee, but he left unpaid quite a number of the prior liens and misappropriated a part of the money in his hands. As a matter of fact the mortgagor and the mortgagee never met until after this misappropriation came to light. The opinion

states that the final and narrow question was one of agency, which would be determined by the answer of the question as to whom the broker represented at the time of his default. The court said that in the first instance the broker represented the mortgagor alone; that his authority was merely to negotiate the loan, and that this did not include the right to receive the money and apply it in payment of other liens; that when the mortgagee gave the broker the check payable to his own order, the mortgagor had not yet executed the mortgage to secure the loan, and that in giving the broker the check the mortgagee clearly made the broker his own agent; that if the broker had then defaulted the loss would have been that of the mortgagee; that the evidence, however, showed that when the broker and the mortgagor again met the mortgagor asked the broker if he had the money for the loan and upon receiving an affirmative reply executed the bond and mortgage and delivered the same; that if there had been no prior liens this would have ended the transaction, but there were prior liens to discharge, and that the mortgagor, instead of arranging to do this himself or having it done in his presence, either permitted or requested the broker to do it; that it was the duty of the mortgagor to see that the prior liens were paid out of the proceeds of the loan and when he acquiesced in the broker's retention of the money for that purpose it amounted to an implied if not an express delegation of authority to the broker to do that which it was the mortgagor's duty to do. As the mortgagor had thus intrusted to the broker the duty of securing the discharge of the prior liens, the broker was the agent of the mortgagor for that purpose.

That case is clearly distinguishable from this one in that the duty of seeing that the prior liens were discharged was in this case committed by the complainant association to its

states that the final and narrow question [illegible] of agency, which would be determined by the manner of the negotiation as to whom the broker represented at the time of his default. The court also found in the first instance the broker represented the mortgagor alone; that his authority was merely to negotiate the loan, and that this did not include the right to receive the money and pay it in payment of other liens; that when the mortgagee [illegible] the broker the check payable to his own order, the mortgagor did not [illegible] the mortgagee to secure the loan, and that in taking the broker the check the mortgagee clearly made the broker his own agent and not the broker and then defaulted the loan and [illegible] the mortgagee; that the evidence, however, showed that when the broker and the mortgagor again met the mortgagor [illegible] the broker if he had the money for the loan and upon receiving an affirmative reply executed the bond and mortgage and delivered the money; that if there had been no prior liens this would have ended the transaction, but there were prior liens to discharge, and that the mortgagor, instead of arranging to do this himself or having it done in his presence, either permitted or requested the broker to do it; that it was the duty of the mortgagor to see that the prior liens were paid out of the proceeds of the loan [illegible] the broker's retention of the money for that purpose [illegible] implied if not express delegation of such duty to the broker to do that which it was the mortgagor's duty to do. [illegible] had thus intrusted to the broker the duty of [illegible] of the prior liens, the broker was the agent of the [illegible] for that purpose.

That case is clearly distinguishable from this one in that the duty of seeing that the prior liens were discharged was in this case assumed by the [illegible] of [illegible] in

own officer and agent, Bruno F. Kowalewski.

Fatta v. Edgerton, 143 N. Y. S. 225; Englemann v. Reuse, 61 Mich. 395; May v. Mutual Benefit Life Ins. Co., 72 Mo. App. 286; Josepthal v. Heyman, 2 Abb. N. C. 22, are other cases cited and relied on. All of them, we think, are clearly distinguishable in that the person charged with agency was an individual acting in a particular individual case. Here, a corporation held out a particular agent for many years as its representative in a given capacity. We think the facts here are not unlike those appearing in Inter-State Bldg. Assoc. v. Ayers, 177 Ill. 9, upon which defendants rely.

The question at issue in that case was whether one Jenks was the agent of the building and loan association so that notice to him would be notice to the association. The association organized an advisory board, of which Jenks was secretary and, apparently, treasurer. Defendant, Mrs. Ayres, applied to the association through Jenks for stock and for a loan. Jenks secured the issue of stock and its transfer to Mrs. Ayers. It was discovered that there was an error as to the person in whose name the land was held. Jenks transmitted the application to the home office. Mrs. Ayers and her husband executed the bond and mortgage in his presence. The association sent the draft for the loan to Jenks, who had Mrs. Ayers endorse it and return it to him. He deposited it in the bank and collected it and held the money, took out of it dues, etc., owing to the association and paid the rest of the money out on orders of Mrs. Ayers and her husband as the building progressed. The duties of Jenks as secretary of the local board were to solicit stock, make loans, collect dues and interest, do the general work of the secretary and treasurer of the local board, keep the accounts of the association, and collect dues, premiums

and fees of the stockholders of the association. Jenks paid off a prior mortgage, recorded its release and recorded the mortgage of the loan association. Mrs. Ayers and her husband had paid Jenks $25 to make a trip to Bloomington for the purpose of hurrying up the loan. It was argued that Jenks acted as the agent of Mrs. Ayers in paying out the proceeds of the loan to her materialmen and laborers on the order of her husband or herself as the building progressed. The court said:

> "This position is untenable. A building association furnishing money to put up a building on the premises mortgaged to it, which building is usually an important part of the security for the payment of the loan, does not place the avails of the loan in the hands of the mortgagor and leave it to his discretion whether he will put the money into the building or use it elsewhere for his other purposes. Such a course would be suicidal to the association. It requires the borrower to permit it to retain the money, and it pays out the money on the order of the borrower, and thus sees that the proceeds of the loan are applied to the building on the real estate given it as security. Jenks performed that responsible office for plaintiff in error (the building and loan association). We hold he was an agent of the association for the purposes of this loan and that notice to him of the prior unrecorded Hefenrichter purchase money mortgage for $1850 was notice to the association."

The facts here are very similar to those which appear in that case. We do not entertain a doubt that Bruno F. Kowalewski in the transaction with the Korczewskis was the agent of the complainant association for the purpose of seeing that prior liens were extinguished, and the association was therefore bound by his acts.

For these reasons the decree is affirmed.

AFFIRMED.

O'Connor, P. J., and McBurely, J., concur.

[illegible]

[illegible] a petit larceny. [illegible] of the [illegible] of the [illegible] communication. [illegible] James 888 to make a trip to [illegible] up the lone. It was [illegible] Ayers in [illegible] Laborers on the order of [illegible] proceeded. The court said:

"This position is untenable. [illegible] alaming [illegible] it, which building is [illegible] for the payment of the lease, [illegible] lease in the hands of the [illegible] tion whether [illegible] eleemb re for his owner [illegible] dal to the [illegible] remain the money, and it pays [illegible] borrower, [illegible] to the building [illegible] performed [illegible] building and lose association. [illegible] association for the [illegible] of the order [illegible] Ohio [illegible]

[illegible] in that case. [illegible] in the transaction with the [illegible] plain at association in the [illegible] were exting [illegible] acts.

[illegible]

O'Connor, [illegible]

35382

JOSEPH WOLCHINOVESKY,
Appellee,

vs.

MADISON & KEDZIE STATE BANK,
Appellant.

INTERLOCUTORY APPEAL FROM

SUPERIOR COURT OF COOK COUNTY.

263 I.A. 645

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant trustee from an order restraining it from prosecuting a certain suit in forcible detainer and for rent begun in the Municipal court of Chicago, against Harry Wolchin, also known as Harry Wolchinovesky, who is the son of complainant, Joseph Wolchinovesky. Complainant, however, has not appeared in this court to support the order entered.

The order for the injunction was issued June 19, 1931, and on June 23rd thereafter defendant made a motion in writing to dissolve the injunction. On July 16, 1931, complainant filed an amendment to his amended bill. On the same day the court entered an order which stated:

> "*** the court having read the amendment to the bill of complaint and having been fully advised in the premises,
> "IT IS HEREBY ORDERED that the motion to dissolve the injunction heretofore ordered be and the same is dismissed."

It is assigned as errors and argued in the brief that the court erred in overruling the motion to dissolve the injunction, in that it proceeded to consider the matter without notice as required by rule 21 of the Circuit and Superior courts, and in that in passing upon said motion it considered the amendment to the amended bill of complaint which had been filed apparently without leave of court. But this appeal is not taken from that order, nor does the record disclose that any motion was made to strike the amendment to the amended bill of complaint, which appears in the record and was evidently given consideration by the court. Under

these circumstances, we think the presumption is that notice was given and that the amendment was properly filed.

The controlling question in the case is whether the allegations of the bill as amended set forth facts which justify the entry of the order for an injunction.

The amended bill alleges that complainant was the owner in fee of certain premises described and that upon certain dates named he executed trust deeds conveying to the defendant bank, as trustee, these premises to secure certain issues of bonds; that he also executed certain assignments of the rents, issues and profits of these premises; that he is about ninety years of age and unable to read and write the English language with the exception that he is able to sign his name and initials and to make his mark; that the witnesses and notaries public never read, nor was there an attempt to explain the documents, to him, and that he was never asked if he signed the same as his free and voluntary act for the purposes, uses and considerations therein set forth; that at the time he was purported to have acknowledged and executed the trust deeds, assignments of rents, notes, bonds and interest coupons he did not understand or comprehend the nature, character, and probable consequence of the instruments, and that fraud, imposition and undue influence were exercised upon him on the dates the instruments were purported to have been executed and acknowledged; that complainant and his son, Morie Wolchinovesky, who was present at the purported execution of the trust deeds, bonds, etc., were employed as tailors and were not familiar with the laws or terms used in regard to such instruments, and that complainant's signature and mark were obtained by fraud, duress, imposition, undue influence and misrepresentation; that he received no money or other consideration for the signing of

those circumstances. [illegible] given and [illegible] the season of [illegible].

[illegible]

allegations of [illegible] the entry of the order [illegible].

[illegible]

owner in fee of certain [illegible] dates must be created first to be [illegible] bank, as trustee, those [illegible] bonds; that he also executed [illegible] issues and profits of these [illegible] years of age and [illegible] with the exception that he [illegible] and to make his work; that the [illegible] never read, nor was there an [illegible] to him, and that he was [illegible] free and voluntary act [illegible] therein set forth; that [illegible] economical and [illegible] notes, bonds and [illegible] embraced the matter, [illegible] statements, [illegible] executed such [illegible] have been [illegible] more [illegible] of the trust deeds, [illegible] not [illegible] statements, and that [illegible] by fraud, duress, [illegible] that he received no money [illegible]

the trust deeds; that on account of the want and failure of consideration and because of the fraud, duress, imposition, undue influence and misrepresentations in the signing of the instruments it would be against equity and good conscience to enforce the collection of the same against complainant.

The stating part of the bill does not set up any facts concerning the suit at law which defendant trustee is restrained from prosecuting, but in the prayer for relief, complainant makes a statement with reference thereto which is more fully set forth in the amendment, which is as follows:

> "Your orator further represents that some time after the filing in this court of the original bill of complaint and this court had acquired jurisdiction of the subject matter and parties thereto, one of the defendants herein, Madison & Kedzie State Bank, a corporation, through its agents and attorney, instituted a suit for possession and for rent of the second floor in the building known as 6657 So. Whipple street, Chicago, Illinois, which is one of the parcels of land and improvements involved in this cause. Said suit in the Municipal court of Chicago is based on the aforesaid assignments of rent recorded as Document Nos. 9856494, 9855495, 9995162 and 998163, which assignments of rent were obtained by fraud, misrepresentation and duress as heretofore alleged herein; that said suit is against your orator's son, Harry Wolchinovesky, sued as Harry Wolchin, and for rent in the sum of ninety ($90) dollars per month, although the other tenants in the said premises only pay sixty two ($62) dollars per month on the first floor, and the tenant on the third floor pays seventy-one dollars and fifty cents ($71.50); that the above mentioned premises, second floor, are used and occupied as a homestead by your orator, his son and his son's family.
>
> "Your orator further represents that the aforesaid assignments of rent, so fraudulently obtained as aforesaid, did not include this apartment; that the defendant, Madison & Kedzie State Bank, not satisfied with taking all the real estate which your orator owned, now seeks to have him put out of possession of his home unless restrained by order of this Honorable Court; that his entire fortune and investments heretofore valued at over five hundred thousand ($500,000) dollars will be a total loss, which injuries are irreparable and cannot be compensated in damages; that the rights of your orator will be entirely prejudiced unless a temporary writ of injunction is issued immediately to restrain the Madison & Kedzie State Bank, a corporation, etc., its agents and attorneys from proceeding with the case in the Municipal court of Chicago, No. 1675195, Madison & Kedzie State Bank, assignee, vs. Harry Wolchin, which suit is really against your orator according to equity and good conscience, your orator is entirely remediless in the premises according to the strict rules of the common law and can only have relief in a court of equity where matters of this nature are properly cognizable and relievable."

[illegible]

There is no doubt of the general rule upon which defendant insists, that before a court of equity will entertain jurisdiction to issue an injunction, complainant must show that he will suffer injury if the relief is not granted and that the allegations must be clear and distinct to the effect that substantial injury will be sustained. The rule is laid down in numerous cases, some of which are cited in the brief. (Allott v. American Strawboard Co., 237 Ill. 55; Girard v. Lehigh Stone Co., 280 Ill. 479; Joseph v. Wieland Dairy Co., 287 Ill. 574.) The allegations of the bill as amended are defective within this rule. Complainant is not named as defendant in the action brought in the Municipal court of Chicago, and no fact is alleged in the bill as amended showing the Municipal court in the suit described would have any jurisdiction whatsoever to pass upon or adjudicate any of his rights.

Under these circumstances it was error to grant the injunction, and the order is reversed.

REVERSED.

O'Connor, P. J., and McSurely, J., concur.

[illegible] there is no doubt of [illegible]
federal justice, that before a court [illegible] equitable
jurisdiction to issue an injunction, [illegible]
will suffer injury if the [illegible]
[illegible] tions must be clear and [illegible] the [illegible]
injury will be sustained. [illegible]
some of rules [illegible] cited in the [illegible]
Board v. [illegible] 227 Ill. [illegible]
Joseph v. [illegible] Co., [illegible]
bill as amended are defective [illegible]
named as defendant in the action [illegible]
Chicago, and so that [illegible]
municipal court in the well [illegible]
whatsoever to pass upon or adjudicate [illegible]
[illegible] under these circumstances [illegible]
injunction, and the order is reversed.

O'Connor, C. J., and Carnwath, J., [illegible]

35339

NORTH SHORE PARK DISTRICT OF COOK COUNTY, ILLINOIS, a municipal corporation, JAMES P. WARD, HYMAN KINZELBERG, HAROLD E. LEOPOLD and FREDERICK H. CHETLAIN, Individually and as Commissioners, etc.,	APPEAL FROM INTERLOCUTORY ORDER OF SUPERIOR COURT OF COOK COUNTY.
Complainants, Appellees,	
v.	
PATRICK C. WINN, (now deceased), THOMAS F. MYERS, JR., LOUIS B. DAVID, ABRAHAM ROTHBART, ERNEST GLEARY and LEO P. MICHAELS,	
Defendants, Appellants.	

263 I.A. 645

OPINION FILED NOVEMBER 12, 1931

MR. JUSTICE WILSON delivered the opinion of the court.

The complainants filed their bill of complaint May 21, 1931, praying that the defendants named in the bill be perpetually enjoined and restrained from interfering with the management and affairs of the business of the North Shore Park District and from interfering with the holding of meetings of the Board of Commissioners in said district. A temporary injunction was granted without notice and without bond. A motion to dissolve the temporary injunction was made and on June 4, 1931, the motion to dissolve was denied. June 17, 1931, an interlocutory appeal bond was filed and the matter comes before this court as an interlocutory appeal from the order granting the temporary injunction in said cause.

The bill of complaint charges that the North Shore Park District of Cook County, Illinois, is a municipal corporation under an act entitled, "An act to provide for the organization of park districts and the transfer of submerged land to those bordering on navigable bodies of water", approved and in force June 24, 1895.

Charges further that James P. Ward, Hyman Kinzelberg, Harold E. Leopold and Frederick H. Chetlain are commissioners of said district

NORTH [illegible] A.
COUNTY, [illegible] a municipal
corporation, [illegible]
KINNELLON, [illegible] and
FREDERICK [illegible],
and as commissioners, etc.,

Jones Lodge, [illegible],

v.

PATRICK O. [illegible], [illegible],
THOMAS [illegible], J. [illegible], LOCKE [illegible],
ABRAHAM [illegible], [illegible] and
LEO F. [illegible],

Defendants, - Respondents.

OPINION FILED NOVEMBER 15, 1931

[illegible]

The complainants filed their bill of complaint [illegible]
1931, praying that the defendants named in the bill [illegible]
enjoined and restrained from interfering with the [illegible] and
affairs of the business of the North Shore [illegible] from
interfering with the holding of meetings of the board of commissioners
in said district. [illegible] temporary injunction was granted without notice
and without bond. [illegible] motion to dissolve the temporary injunction was
made and on June [illegible], 1931, the motion to dissolve was denied. June 17,
1931, an interlocutory appeal bond was filed and the matter comes
before this court on an interlocutory appeal from the order granting
the temporary injunction in said cause.

The bill of complaint charges that the North [illegible]
Park District of Jack County, Illinois, is a municipal corporation
not entitled, "in act to revise the [illegible] of park
districts and the transfer of unexpired land to [illegible] boarding, on
navigable bodies of water", [illegible] June [illegible], 1931.

Charges further that James [illegible], [illegible], [illegible]
Leopold and Frederick [illegible] are boarding [illegible] of said district

and join in this action as complainants, both as commissioners and individually; that James P. Ward and Frederick H. Chetlain, parties complainant, were duly elected to the office of commissioners, but that their terms have expired and that they are at present holding over until their successors shall be duly elected and qualified; that Patrick C. Winn and Thomas F. Myers, Jr., parties defendant, claim to have been elected commissioners of said district at an election held in the City of Chicago on April 7, 1931, and have demanded that they be declared the duly elected commissioners of said district for the ensuing term of six years beginning in 1931, as successors to Ward and Chetlain; charges that Winn and Myers Jr. together with Louis B. David, Emmet Cleary, Abraham Rothbart and Leo P. Michaels, joined as defendants in said bill created a disturbance at a meeting of the Board of Commissioners of the North Shore Park District, held on the evening of May 13, 1931; charges that the Board of Commissioners was advised by its attorney that no legal election had been held in said district and that Winn and Myers were not elected in accordance with the provisions of said act; that the commissioners refused to declare Winn and Myers duly elected; charges that at the meeting held on May 13, the defendants and scores of other persons gathered at the office of said district and that Winn announced publicly that no meeting of the Board would be held; that Ward, as president of the Board, announced that the Board of Commissioners was in session for the transaction of business and called the meeting to order and that Myers objected to said Ward attempting to act as a commissioner and that the defendants and many others began to stamp their feet and shout; that the police officers of the district were present, but were unwilling or unable to control the rioters and that, by reason of the disturbance, it was impossible to hold the regular meeting of said Board of Commissioners.

It is further charged that it is the duty of the Board to maintain police and light on boulevards within the district, to maintain beaches, and to perform services necessary to conserve the property of the district; that the annual amount of business amounted to $200,000 per annum and that bills have accumulated and are unpaid and that interest on anticipation warrants is due and unpaid, and that the employees have not been paid for a period of over two weeks; charges that the commissioners are unable to perform their duties because of the interference of Winn and Myers and those associated with them; charges that a meeting is to be held shortly at which the officers are to be elected and unless the courts restrain the said Winn and Myers and those confederating with them from interfering with the said Board, it will be impossible for said Board to function in accordance with the act providing for its creation.

It appears from the bill that the Board consists of five members. It appears also from the bill that the right to hold office as commissioners is not questioned as to three of that number, namely, Kinzelberg, Leopold and Savage. These three constitute a majority of the Board and we are unable to see why these three cannot function regardless of the question as to who are entitled to fill the other two positions. The Commissioner Savage does not appear to be a party to the bill, either as complainant or defendant. These three commissioners, constituting a majority of the Board as it now exists, have full power and authority to direct the police force of the district to maintain order at any and all meetings. If the police force is unwilling or unable to control any disturbance, it should be dispensed with and proper police officials appointed who would be willing and able to perform their duties.

So far as we are able to ascertain from the bill, it appears that Winn and Myers, Jr. claim to have been elected commissioners and that Ward and Chetlain dispute their right to the office.

It is further claimed that it is the duty of the [illegible] to maintain police and light on conjoined with the district, to maintain sewerage, and to exercise necessary to conserve the property of the district; that the annual amount of business exceeds to $300,000 per annum and that [illegible] and [illegible] and that interest [illegible] the employees have not been paid for a period of over two years; charges that the commissioners [illegible] because of the interference of [illegible] with them; charges that [illegible] is to be held monthly at which the officers are to be sworn and unless the county [illegible] tion and [illegible] the said board, it [illegible] to [illegible] in accordance with the act governing for its operation.

It appears from the bill that the board consists of five members. It appears also from the bill that the right to hold office as commissioners is not conferred as to three of such members, namely, Kinsaldera, Woodck and Dawson. Under these conditions a majority of the board and as are unable to act, may these three cannot function regardless of the question as to who are entitled to fill the other two positions. The [illegible] have not answer to be a party to the bill, either as complainant or defendant. These three commissioners, constituting a majority of the board as it now exists, have full power and authority to direct the [illegible] force of the district to maintain order at any and all meetings. If the police force is [illegible] or unable to control any disturbance, it should be the duty of the [illegible] and proper police officers appointed. He would be willing and able to perform their duties.

So far as we are able to ascertain from the bill, it appears that Tom and Ayers, [illegible] have been elected commissioners and that Ford and Gentlin are their right to act as officers.

The fact that bills have accumulated which should be paid and that the beaches and boulevards should be protected, lighted and maintained, does not appeal to this court as presenting a situation requiring the intervention of a court of equity. It appears rather that the real contention is the title to the office of Commissioners, and the question of protection of property rights is merely incidental thereto. Garmire v. American Mining Co., 93 Ill. App. 331, cited by complainants in support of their position that a property right is involved, appears to have been an action by officers of a private corporation. Courts of equity will not interfere in contests involving the title to public office. High on Injunctions, 4th Ed. Vol. 2, Sec. 1312, p. 1325, states the rule as follows:

> § 1312. TITLE TO OFFICE NOT DETERMINED IN EQUITY. No principle of the law of injunctions, and perhaps no doctrine of equity jurisprudence is more definitely fixed or more clearly established than that courts of equity will not interfere by injunction to determine questions concerning the appointment or election of public officers or their title to office, such questions being of a purely legal nature, and cognizable only by courts of law. A court of equity will not permit itself to be made the forum for determining disputed questions of title to public offices, or for the trial of contested elections, but will in all such cases, leave the claimant of the office to pursue the statutory remedy, if there be such, or the common law remedy by proceedings in the nature of a quo warranto. Thus, equity will not interfere by injunction to restrain persons from exercising the functions of public offices, on the ground of the illegality of the law under which their appointments were made, but will leave that question to be determined by a legal forum. And a temporary injunction granted pendente lite, and until the question of the validity of the law under which defendants claim their offices can be determined, will be dissolved. * * **

To the same effect see Dickey, et al. v. Reed, et al, 78 Ill. 261; The People v. Rose, 211 Ill. 352; Michels v. McCarty, 196 Ill. App. 493; Sergel v. Healy, 218 Ill. App. 245.

The government is divided into three divisions; legislative, administrative and judicial. Each division has its own separate and distinct functions. Courts when called upon will construe legislative enactments for the purpose of arriving at their

paid and the [illegible]

and [illegible]

ation requires the [illegible]

rather that the [illegible]

measures, and [illegible]

merely indicated [illegible]

App. 331, cited by [illegible]

a property right is involved, [illegible]

officers of a private corporation. [illegible]

fers in contracts involving [illegible]

injunctions, [illegible]

as follows:

> 8 Life. [illegible]
> No principle of the [illegible]
> doctrine of equity jurisdiction [illegible]
> more clearly established [illegible]
> interfere by injunction [illegible]
> the so obtained or election [illegible]
> to office, such contests [illegible]
> and courts only by [illegible]
> not permit itself to be [illegible]
> questions of title to [illegible]
> contested elections, [illegible]
> claimant of the office [illegible]
> there be even, or the [illegible]
> the merits of a [illegible]
> by injunction to [illegible]
> of public [illegible]
> under this [illegible]
> question to be [illegible]
> injunction [illegible]
> the validity of the [illegible]
> offices can be [illegible]

To the same effect see [illegible]

The People v. [illegible]

485; Ferrel v. [illegible]

The [illegible]

lative, [illegible]

appropriate [illegible]

etrue legislative [illegible]

intent and in passing upon their constitutionality. Courts of law will entertain contests involving the title to office when properly presented. Courts of equity, however, under a long line of decisions in this state, have refrained from attempting to interfere with the manner of operation of public bodies by injunction, nor will they attempt to settle quarrels between claimants to office.

The prayer of the bill in this case asks that the defendants, Minn and Myer, Jr., be restrained from interfering with the holding of meetings of the North Shore Park District. These defendants claimed to be the duly and properly elected officals of that district and the question of the right of a court of equity to restrain them from insisting upon their rights, if any, would necessitate a complete hearing as to their title to the offices in question. Equity will not undertake to perform this function, either directly or indirectly. It has been insisted that this court should first grant the chancellor who granted the preliminary injunction an opportunity to pass upon the merits of the bill and has cited cases from this court holding, that this court will not entertain an appeal from an interlocutory decree where it is evident that the purpose is to have the merits of the controversy decided in advance. The defendants in the case before us, however, made a motion to dissolve the injunction and the chancellor had ample opportunity to consider the bill, together with the objections to it. The chancellor having had an opportunity to pass upon the question after granting an injunction without notice and without bond, had the opportunity to consider the question fully, on the motion to dissolve.

The case of Bergel v. Healy, 318 Ill. App. 245, was an appeal from an interlocutory injunctional order. In that case the court held that the court was without jurisdiction to entertain the bill of complaint.

intent and in [illegible] [illegible]
will entertain such [illegible] [illegible]
presented. [illegible]
in this at [illegible]
the manner of [illegible]
they attempt to [illegible]

The lawyer of the [illegible] the
defendants, Miss [illegible], [illegible] mentioned [illegible]
the holding of [illegible]
defendants claimed to be [illegible]
that district [illegible]
restrain them from [illegible]
take a complete hearing [illegible]
equity will not [illegible]
or irregularity. [illegible]
grant the chancellor who granted the [illegible]
opportunity to pass upon the merits of the [illegible]
from this court holding, that this [illegible]
from an interlocutory order. [illegible]
is to have the merits of the controversy [illegible]
defendants in the case before us, however, [illegible]
the injunction and the chancellor [illegible]
the bill, together with the objections to it. [illegible]
had an opportunity to pass upon the question [illegible]
injunction without notice [illegible]
consider the question fully, [illegible]

The case of [illegible] v. [illegible]
was an appeal from an interlocutory [illegible]
the court held that the court was [illegible]
the bill of complaint.

From a careful reading of the bill in this proceeding, we are convinced that it is not one which confers jurisdiction upon a court of equity and that the Superior Court, as a court of equity, was without jurisdiction to enter the injunctional order appealed from. Said order of the Superior Court granting the preliminary injunction as of May 21, 1931, is therefore, reversed.

ORDER REVERSED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

from a careful reading of the bill in this connection, we are convinced that it is not one which confers jurisdiction upon a court of equity and that the superior court, as a court of equity, was without jurisdiction to enter the injunctional order complained from. Said order of the superior court in enjoining the preliminary injunction as of any da, said, is therefore, reversed.

[illegible]

Hassell, C.J. [illegible], J. [illegible].

35380

CITIZENS STATE BANK OF CHICAGO, a corporation, individually and as trustee,

(Complainant) Appellee,

v.

MARTIN WIERZBOWSKI, et al,

Defendants.

INTERLOCUTORY APPEAL OF MARTIN WIERZBOWSKI,

(Defendant) Appellant.

INTERLOCUTORY APPEAL

FROM SUPERIOR COURT

COOK COUNTY.

263 I.A. 645

Opinion filed November 12, 1931

MR. JUSTICE WILSON delivered the opinion of the court.

Citizens State Bank of Chicago, a corporation, as trustee, filed its bill of complaint to foreclose a trust deed on behalf of the owners and holders of certain promissory notes and interest coupons. The trust deed was given to secure the principal indebtedness of $70,000, evidenced by 68 principal promissory notes with interest at the rate of 6 per cent per annum, payable semi-annually. The installments of interest are evidenced by 684 interest coupons, bearing date the same as that upon which the trust deed was executed. The trust deed conveyed certain real estate situated in the City of Chicago, together with improvements thereon, and provided that the trustee, upon failure to pay the indebtedness as it fell due or the interest thereon, should have the right to foreclose for the benefit of the holders of the principal notes and interest coupons and should be entitled to recover all expenses, including reasonable solicitor's fees.

The bill of complaint charges that certain notes have been paid, but that default has occurred in the payment of certain other principal promissory notes in the amount of $3,500,

Opinion filed November 15, 1931

and interest in the amount of $1,890, all of which was due May 26, 1931; charges that, by reason of the default, the legal holders of the notes have elected to declare the principal sum of $63,000 due and payable; charges that the premises are improved with a brick building, consisting of 19 apartments and that said building is in poor condition and repair, and scant security for the indebtedness; charges that the premises are worth less than $75,000 and that a receiver should be appointed to take charge and collect the rents.

The trust deed is in the usual form, containing a clause mortgaging the rents, issues and profits of the premises. The bill specifically states the value of the premises and sets out in detail the amount of the indebtedness, together with the probable costs of the foreclosure proceeding. The amount of the indebtedness, plus the probable costs, amounts to $74,835, according to the allegations of the bill. A comparison of the value of the property and the amount of the indebtedness, coupled with the probable costs of the foreclosure proceeding, shows that the property is scant security.

The bill was verified and considered by the court, in support of the motion for a receiver. This matter comes before this court on an interlocutory appeal from the order appointing the receiver.

We agree with counsel for defendants that a receiver of the property should not be appointed with power to collect the rents, issues and profits, unless the property is scant security. This court has also held that the allegation that the property is scant security is a conclusion. In the case at bar, however, the facts charged in the bill are sufficient to show, as a matter of fact, that the property is scant security for the indebtedness.

We are, therefore, of the opinion that the court had sufficient facts before it upon which it could base its order for the appointment of a receiver. The bill contained an allegation that the motion for a receiver could be made with or without notice. The order of the court however, stated that due notice of the proceeding had been given prior to the entry of the order and it appears from the record that a copy of the notice was left at the home of the defendants the day before the order was entered. In view of the finding of the order, we will assume that the notice was sufficient. The Supreme Court of this State has approved the form of verification accompanying the bill of complaint. Farrell v. Heiberg, 263 Ill. 407; Hulse v. Nash, 332 Ill. 500.

We see no reason for disturbing the order appointing the receiver. For the reasons stated in this opinion, the order of the Superior Court is affirmed.

ORDER AFFIRMED.

HEBEL, P.J. AND [illegible], J. [illegible].

35381

CITIZENS STATE BANK OF CHICAGO, a corporation, individually and as trustee, (Complainant) Appellee, v. MARTIN WIERZBOWSKI, et al, Defendants,	INTERLOCUTORY APPEAL FROM SUPERIOR COURT, COOK COUNTY.
INTERLOCUTORY APPEAL OF MARTIN WIERZBOWSKI, (Defendant) Appellant.	

OPINION FILED NOVEMBER 12, 1931

MR. JUSTICE [illegible] delivered the opinion of the court.

This cause was consolidated with case, General Number 35380, Citizens State Bank of Chicago, a corporation, individually and as trustee, (Complainant) Appellee, v. Martin Wierzbowski, et al, Defendants - Interlocutory Appeal of Martin Wierzbowski, (Defendant) Appellant.

The facts and pleadings in this case are the same as those in the case General Number 35380 and, for the reasons stated in that opinion, the order of the Superior Court appointing a receiver in this case is affirmed.

ORDER AFFIRMED.

HEBEL, P.J. AND [illegible], J. CONCUR.

[illegible]

CITIZENS [illegible]
a corporation, [illegible]
and as trustee,

(Complainants) [illegible]

v.

MARTIN [illegible]

Defendants.

INTERLOCUTORY [illegible]
HEARSCHEL,

(Defendant) [illegible]

OPINION FILED NOVEMBER 13, 1931

[illegible]

[illegible]

3S280. Citizens [illegible] of [illegible], [illegible]
and as trustee, [illegible] v. [illegible],
et al. Defendants - [illegible]

(Defendant) [illegible]

[illegible]

as those in the [illegible]

stated in that [illegible], the [illegible]
a receiver in this [illegible]

[illegible]

837

35051

J. LIPKE and MINNIE LIPKE,
Appellees,

v.

FOREMAN-STATE TRUST AND SAVINGS BANK, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

263 I.A. 646[2]

MR. PRESIDING JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

In a first class action in assumpsit for money had and received, commenced in the municipal court on July 25, 1930, there was a trial without a jury in November, 1930, resulting in the court finding the issues against defendant and assessing plaintiffs' damages at the sum of $7891.47. On January 9, 1931, judgment was entered on the finding against defendant and the present appeal followed.

In plaintiffs' statement of claim they allege the making of two "pretended" written contracts, each dated May 10, 1926, for the purchase by them of two lots (17 and 18) in a certain named subdivision in Chicago, Illinois. Copies of the contracts (substantially the same except as to the particular lot involved) are set forth. The purchase price of each lot is stated to be $4,350. At the commencement of each contract is the statement:

"This agreement made this 10th day of May, 1926, between the HOWARD AND LINCOLN REALTY TRUST, OF WHICH THE FOREMAN TRUST AND SAVINGS BANK IS TRUSTEE, ** first party, and J. Lipke and Minnie Lipke, ** second party, Witnesseth:"

It is then stated that first party agrees that if second party shall first make all the payments and perform all of the agreements provided to be made and performed by second party, it shall cause to be conveyed to second party by a trustee's deed all the right, title and interest of the Foreman Trust and

Savings Bank, as Trustee, in and to the land. (Here follow a description of the particular lot and provisions relating to payments on the purchase price.) It is also stated that, when the entire purchase price has been paid by the second party, first party will deliver to them an owner's guaranty policy in the usual form, issued by the Chicago Title & Trust Co., showing title in the Trustee, etc. It is also stated that time is of the essence of the contract, and that in case of the failure of second party to make any of the payments or to perform any of the covenants to be made or performed by them as provided, the contract shall at the option of first party, or the Trustee, be terminated and cancelled, and in that case all payments made shall be retained by first party as liquidated damages. There are other provisions, not material to the present issues. Each contract is signed as follows:

"HOWARD-LINCOLN REALTY TRUST OF WHICH THE FOREMAN TRUST AND SAVINGS BANK IS TRUSTEE.
By Geo. D. Gamm
Manager.
JOE LIPKE (Seal)
MINNIE LIPKE (Seal)."

In the statement of claim plaintiffs further allege the consolidation of the Foreman Trust and Savings Bank with the State Bank of Chicago, whereby defendant, Foreman-State Trust and Savings Bank, became the successor of Foreman Trust and Savings Bank; that plaintiffs from time to time after May 10, 1926, paid to defendant, or its predecessor, on account of the contracts the sum of $8,002.93, (as shown by an attached schedule); that plaintiffs did not receive any consideration for the several payments, nor did any one offer to convey the property to them; that the contracts "do not purport to be contracts by plaintiffs with any living or artificial person, but purported contracts between plaintiffs <u>and a written document or chose in action</u>"; that the

[illegible] Justice Kelleher's description of the situation is not [illegible] relevant to the matter in the order of [illegible]. [illegible], then the entire purchase price was [illegible] by the [illegible] party. First party will deliver a [illegible] of [illegible] to the usual form, issued in [illegible] [illegible] vesting title in the "vendor", and [illegible] the existence of a second party to make any of the [illegible] [illegible] the covenants to be [illegible] or the contract shall at the option of first party, or her trustee, be terminated and cancelled, and in that case all [illegible] shall be retained by first party as liquidated damages, [illegible] other remedies, not material to the present [illegible]. Some [illegible] to it read as follows:

"FOR AND-IN-ACCOUNT [illegible]
[illegible] B.C. [illegible].
by [illegible] D. Gunn
[illegible]
[illegible] (sgd)
[illegible]."

In the [illegible] of [illegible] [illegible] the cancellation of the [illegible] [illegible] with the State Bank of [illegible], [illegible] [illegible] Savings Bank, [illegible] [illegible] Savings Bank; that [illegible] to deliver, or its [illegible], [illegible] the [illegible] sum of $3,[illegible], [illegible] ; that [illegible] title did not receive any [illegible] [illegible], nor did any one offer [illegible] that the contracts do not [illegible] [illegible] by [illegible] with any [illegible] or artificial person, but [illegible] contracts between plaintiff and a [illegible] [illegible] or [illegible] to action": [illegible] the

contracts "are and always were null and void"; that by reason thereof defendant then and there became obligated and indebted to plaintiffs for the moneys theretofore paid to it or to its predecessor bank; and that the amount so paid was $8,002.93, with interest at 6% per annum from July 2, 1930, making the total amount due to plaintiffs $9,301.68.

In defendant's amended affidavit of merits, filed by leave of court during the trial on November 19, 1930, it denied that it executed the contracts; admitted the consolidation of the two mentioned banks and that defendant is the successor bank; denied that plaintiffs received no consideration for the payments as claimed; denied that the contracts do not purport to have been made with any living or artificial person or are void as claimed; and alleged that the vendor mentioned "is in reality a partnership consisting of George D. Gamm, Thomas K. Valos and Arthur R. Maloney."

On the trial plaintiffs introduced in evidence the two contracts, as Exhibits 51 and 52, and showed by oral and documentary evidence that by numerous partial payments in supposed performance of the contracts they, or J. Lipke alone, paid to defendant bank, as trustee, from time to time the aggregate sum of $6,899.64. Plaintiffs' theory of their right to recover back in the present action said aggregate sum, including legal interest as allowed by the court in its finding, was that said contracts were "void for lack of a vendor." And it was argued in substance that if plaintiffs had made all the stipulated payments and performed all their covenants mentioned in the contracts, and if their demands for a deed of the lots had not been complied with, there was no one against whom they could have maintained a bill for specific performance and thereby compel the delivery of such a deed; that the contracts at the time of their execution were "unilateral" and

"without consideration"; and that, hence, all monies paid under the contracts could be recovered back.

Defendant's theory of defense was in substance that the named vendor in the contracts, "Howard and Lincoln Realty Trust", was on May 10, 1926, and prior and subsequent thereto, a co-partnership, composed of George D. Gamm, Thomas R. Valos and Arthur R. Maloney, engaged in the business of buying and selling real estate in Chicago and making subdivisions of lands and selling lots to the public in those subdivisions; that some time prior to May 10, 1926, said co-partnership under said name conveyed to defendant said lots 17 and 18 in the particular subdivision (with other property), in trust under a trust agreement or agreements, whereby defendant held the naked legal title to the land but subject, as to subsequent disposition, to the directions of the co-partnership, - the equitable title remaining in the copartnership; that all moneys received by defendant from plaintiffs, by virtue of said contracts (Exhibits 51 and 52) had been paid over by defendant to the copartnership; and that defendant was not indebted in any sum to plaintiffs.

The trial court allowed defendant to show, and it did show by competent evidence, that the three persons above named on May 10, 1926, and prior and subsequent thereto, were engaged in said real estate business, as co-partners and trading under the name of "Howard and Lincoln Realty Trust", and that all Monies which defendant had received from plaintiffs under said contracts had in turn been paid over to the co-partnership, but the trial court refused to allow defendant to introduce in evidence said trust agreement or agreements. In this last mentioned ruling we are of the opinion that the court committed reversible error.

And we think that the court erred in marking "Refused" the following propositions of law, submitted with others by defendant:

"3. The Court holds as a matter of law that the contracts, introduced in evidence as plaintiffs' exhibits 51 and 52, and purporting to have been entered into between Howard and Lincoln Realty Trust, as first party, and J. Lipke and Minnie Lipke, as second parties, and each of said contracts, were not, at the time of their execution, invalid or void because of want of proper parties thereto.

4. The Court holds as a matter of law that said contracts *** were not, nor was either of them, void for want of mutuality."

And we think that the finding and judgment are against the weight of the evidence.

Our reasons for the above holdings are set forth in the opinion of this court in the very similar case of Isiasbrodt v. Elmore & Co., 262 Ill. App. 1 (certiorari denied by Supreme Court at the October, 1931, term), to which reference is made.

Other grounds for a reversal of the judgment are urged by defendant's counsel, but we deem it unnecessary to consider them.

The judgment of the municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Kerner and Scanlan, J. J., concur.

35091

FRANK A. GARDEN,
Appellant,

v.

EUGENE J. SULLIVAN and
CATHERINE SULLIVAN,
Appellees.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

263 I.A. 646

MR. PRESIDING JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

In a proceeding under section 89 of the Practice Act, and after a hearing, the superior court on February 10, 1931, ordered that the ex parte verdict and judgment for $5,000, rendered against defendants on September 24, 1930, be vacated and set aside. From the order plaintiff prosecutes the present appeal.

On October 11, 1929, plaintiff commenced an action in case against defendants for personal injuries claimed to have been sustained by him on January 28, 1929, by reason of defendants' negligence. To the declaration they filed a plea of the general issue. On July 29, 1930, by virtue of rule 23 of the superior court, plaintiff's attorney, Julius H. Neale, caused a written notice, entitled in the cause and signed by him, to be served upon defendants' attorney, Francis J. Sullivan (through a stenographer, Mary Belzer, employed in Sullivan's office) notifying him that Neale, as plaintiff's attorney, desired that the cause "be placed upon the trial calendar" and that he (Neale) "shall file this notice for that purpose pursuant to the rules of the court." On its face the notice contains the following: "Received a copy of the within notice this 29th day of July, 1930. (Signed) Francis J. Sullivan, per B". Attached thereto is an affidavit of Neale, that he "has caused notice for trial to be served upon Francis J. Sullivan, attorney for defendants, and that he (Neale) is ready for trial

35031

FRANK W. GILLIAM,
Appellant,

v.

EUGENE L. [illegible] et
CATHERINE [illegible],
Appellees.

Mr. Justice [illegible]

In a proceeding [illegible] and after a hearing, [illegible] order that the [illegible] equitable [illegible] from the order [illegible].

On [illegible] case against [illegible] in [illegible] mentioned by [illegible] negligence. [illegible] issue. [illegible] court, plaintiff [illegible] notice, [illegible] defendants' [illegible] Mary Nelson, employed in [illegible] bank, as plaintiff's attorney, [illegible] upon the trial [illegible] for the purpose [illegible] the notice [illegible] notice this 20th day of July, 19[illegible]. [illegible] Per E. [illegible] stamped [illegible] "Has caused notice [illegible] attorney for defendant, and [illegible] for trial

and expects to be ready whenever this cause shall be reached for trial." The notice, acknowledgment of receipt of copy and attached affidavit were filed with the clerk of the court on the following day (July 30th). On September 23, 1930, plaintiff filed a similiter to defendants' plea of the general issue. On September 24, 1930, the original judgment against defendants was entered. In the judgment order it is recited that on that day plaintiff and his attorney came but that defendants did not, nor anyone for them, and that they were defaulted, that a jury was called and sworn and that evidence was heard, and that the jury returned a verdict finding defendants guilty and assessing plaintiff's damages at $6,000.

On December 10, 1930, more than two months after the term at which the judgment was entered had passed, defendant, by their attorney, Sullivan, filed a written motion, supported by affidavits, to vacate said judgment and moved that the execution theretofore issued be stayed, etc. The latter motion was granted and the former set for hearing at a future day.

The stated grounds in defendants' long written motion for the vacation of the judgment are in substance (1) That the provisions of rule 23 of the court as regards notice of and causing the placing of the cause upon the trial calendar were not properly complied with; (2) that when such notice was given the cause was not at issue for the reason that plaintiff had not yet filed a similiter to defendants' plea of the general issue; (3) that when the cause was called for trial on September 24, 1930, it was called "out of turn;" (4) that the declaration does not state a cause of action; and (5) that the notice of plaintiff's attorney, for the purpose of placing the cause upon the trial calendar, was served and receipted for by a stenographer in the office of defendants' attorney, which stenographer had no authority to sign receipts for such notices for defendants' attorney and who did not advise him of the service of

and expect to be [illegible] however ill [illegible] or [illegible] [illegible]
[illegible]." The position, as [illegible] [illegible] of [illegible] and
attach a sufficient [illegible] [illegible] of the court on the
following day (Sir [illegible]). [illegible] Jones' [illegible]
a similar to defendants' [illegible] [illegible] December
24, 1930, the original judgment [illegible] [illegible] in [illegible]
the judgment are [illegible] [illegible] plaintiff and its
attorney were but [illegible] [illegible] [illegible] [illegible]
and that they were [illegible] [illegible] [illegible] [illegible]
that evidence [illegible] [illegible] [illegible] [illegible]
the defendants [illegible] [illegible] [illegible] [illegible]

[illegible] 1, 1931, [illegible] [illegible] after the term
of which the judgment was [illegible] [illegible], by their
attorney, [illegible] [illegible] [illegible] [illegible] by affidavits,
to vacate said judgment [illegible] [illegible] [illegible] [illegible]
issued be stayed, etc. [illegible] [illegible] [illegible] [illegible] the [illegible]
not for hearing [illegible] [illegible] [illegible].

The [illegible] [illegible] [illegible] [illegible] [illegible]
for the vacation of the judgment [illegible] [illegible] [illegible] [illegible] the
provisions of rule [illegible] of the [illegible] [illegible] [illegible] [illegible] [illegible]
the plaintiff of the issue [illegible] [illegible] [illegible] [illegible] [illegible] properly
complied with; (2) that [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] was not
at issue for the reason that [illegible] [illegible] [illegible] [illegible] filed a sufficient
to defendants' plea of the general issue; (3) that when the [illegible] [illegible]
was called for trial on [illegible] [illegible] [illegible] [illegible] [illegible] "out of
turn;" (4) that [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
and (5) that the [illegible] of plaintiff's attorney, for the purpose of
placing the issue upon the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
for by a stenographer in the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
stenographer [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
defendants' attorney [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

the particular notice, and he had no knowledge of such service.

We find no merit in any of the grounds, 1 to 4 inclusive. Clearly, none of them is such an error of fact as did not appear of record and was unknown to the court when said original judgment was entered and which, if known, would have precluded the entry of the judgment. (Cramer v. Commercial Men's Ass'n, 260 Ill. 516, 522; Marabia v. Thompson Hospital, 309 Ill. 147, 153.)

On the hearing, in support of the 5th ground, defendants read the affidavits of their attorney, Sullivan, and of his stenographer, Mary Belzer. Sullivan, in his affidavit, stated in substance that on November 4th, 1929, he filed defendants' plea of the general issue; that he never received any notice of the placing of the cause upon any trial calendar; that about November 6, 1930, he learned for the first time that it had been placed upon calendar No. 1, and that a judgment had been rendered against defendants on September 24, 1930; that upon examination of the files he found a "purported" notice signed by plaintiff's attorney, notifying him that said attorney desired to have the cause placed on the trial calendar, etc., which notice on its face bore the written acknowledgment of its receipt by copy, signed in his name, per "B", and dated July 29, 1930; that in July, 1930, he maintained in Chicago an office, in which besides himself were an attorney, named Arthur Manning; Francis J. Sullivan, Jr.; and a young woman, named Mary Belzer, who was employed by affiant as a typist and stenographer; that Mary Belzer had no authority from affiant to accept notices intended to be served upon him, or to sign affiant's name to receipts for such notices, but "was instructed by him in all cases * * to bring the same either to affiant, Arthur Manning or Francis J. Sullivan, Jr., and that she should not sign affiant's name to any such receipts;" that in July, 1930, the only persons in charge of said office were affiant, Manning and Sullivan, Jr.; that

Mary Belzer, although it appears that she did receive a copy of the notice now on file, never delivered the same to affiant or informed him that she had received it for him; and that affiant never had any knowledge of the existence or service of the notice until about November 6, 1930.

Mary Belzer, in her affidavit, stated in substance that she at no time has had authority from Francis J. Sullivan, in whose employ as a stenographer she was and is, to receipt for or accept notices to him in cases pending in court, but was instructed by him that "in all cases she should direct parties seeking to serve notices to serve the same upon said Sullivan, Manning or Sullivan, Jr."; that she "now remembers" that about July 30, 1930, a notice was brought to her in said office, in the case of Garden v. Sullivan; that, notwithstanding said instructions, she received said notice and signed the same, "intending later to call the same to the attention of said Francis J. Sullivan, but that the notice became misplaced in one of the drawers of her desk, and passed from her attention, and she did not again see the same until some time in November, 1930;" and that prior to that time she never told said Sullivan that she had received and receipted for said notice, or informed either said Manning or Sullivan, Jr. of that fact.

During the hearing the court allowed plaintiff's attorney to state the following: That he (Neale) on July 29, 1930, personally appeared in said Sullivan's office, and gave said notice to a young lady in that office; that she took it and went into an inner office and talked with someone there; and that she then came out again and signed said receipt on the notice in Sullivan's name. At the end of the hearing the trial judge, in directing the entry of an order vacating the original judgment, stated: "I don't like to take $5,000 of anybody's money from them without them having a show; * * they ought to have a run for their money."

Mary Bolsover, although it sounds like a [illegible] one of the motives her on this, was relatively [illegible] but is informed her that she [illegible] for [illegible] Fisher never had any knowledge of the [illegible] of the radio until about "October 7, 1932."

Mary Bolsover, in [illegible], "[illegible] [illegible] she at no time had [illegible] in, [illegible] whose employ as a chemist, [illegible] accept notices [illegible] by him that "in all [illegible] [illegible] serve notices to serve the [illegible] Sullivan, [illegible]" that the "[illegible] [illegible]. I [illegible] a notice was brought to [illegible] in [illegible] of Fischer v. Sullivan; that notwithstanding, with [illegible] notices, she received said notice and signed [illegible] to the attention of [illegible] Sullivan, but [illegible] the notice became misplaced in one of the drawers of her desk, was recovered from her attention, and she did not [illegible] the [illegible] until some time in November, 1932;" and [illegible] Sullivan [illegible] said Sullivan [illegible] she had [illegible] notices, or informed either [illegible] of Sullivan [illegible].

During the hearing [illegible] Sullivan's attorney to state the following: "[illegible] [illegible], 1932, personally appeared in [illegible] Sullivan's office, and [illegible] notice to a woman lady in that office; [illegible] and [illegible] and [illegible] the [illegible] of the [illegible] the original judgment, [illegible] "I don't like to [illegible] $2,000 of money's money from [illegible] saving a [illegible] who ought to have a [illegible] for their money."

We do not think that defendants made out any such case as warranted the court in setting aside the original judgment under the provisions of section 89 of the Practice Act. It sufficiently appears that, when the original cause was tried and the verdict and judgment rendered ex parte, the failure of defendants or anyone for them to appear at that time, was due to the admitted negligence of said stenographer in Sullivan's office, or to the subsequent negligence of Sullivan himself, or of his agents, Manning or Sullivan, Jr., in not examining the court files or watching the cause after it had appeared on the trial calendar. It is well settled that the provisions of the statute are not intended to relieve a party of the consequences of his own negligence. (Cramer v. Commercial Men's Ass'n, 260 Ill. 516, 521; Loew v. Krauspe, 320 Ill. 244, 250.) Furthermore, it appears that the court set aside the original judgment after the term at which it was entered had passed, not on account of any error of fact warranting such action, but because he was of the opinion that he had the equitable power or the discretion so to do. It has frequently been decided that the motion under said section is not addressed to the equitable powers or discretion of the court. (Consolidated Coal Co. v. Oeltjen, 189 Ill. 85, 87; Cramer v. Commercial Men's Ass'n, supra; Loew v. Krauspe, supra.)

The order of February 10, 1931, vacating and setting aside said judgment against defendants of September 24, 1930, is reversed.

REVERSED.

Kerner and Scanlan, JJ., concur.

35141

WALSH MOTORS, INC., a corporation, for the use of AETNA ACCEPTANCE CO., a corporation,

Appellee,

v.

HARBOR STATE BANK, a corporation, garnishee,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

263 I.A. 346

MR. PRESIDING JUSTICE JONES DELIVERED THE OPINION OF THE COURT.

In a garnishment proceeding there was a trial without a jury in December, 1930, resulting in a finding and judgment against the garnishee, Harbor State Bank (hereinafter called the Bank), for $900, and it appealed.

On February 17, 1930, the Aetna Acceptance Co. (hereinafter called the Aetna Co.) caused a judgment by confession for $1238.25 to be entered in the municipal court against Walsh Motors, Inc., original defendant (hereinafter called the Motor Co.) Execution was placed in the bailiff's hands on February 21st, who on April 25th returned the writ "no property found and no part satisfied," and on April 29, 1930, the Aetna Co. caused a garnishee summons to be served upon the Bank. To the usual interrogatories the Bank on May 7, 1930, filed an answer in which it stated that neither at the time of the service of the writ was it, nor at the present time is it, indebted to the Motor Co. in any sum, and that neither at the time of said service nor since did it have in its control or possession any lands, goods, chattels, effects, rights, etc., belonging to the Motor Co. The Aetna Co. contested the answer.

On the trial the theory of the Aetna Co., beneficial plaintiff, was in substance that the Motor Co., in pursuance of a conspiracy with the bank, fraudulently sold and transferred to the

WALSH MOTORS, [illegible], a [illegible] corporation,
for the use of [illegible]
DO., a corporation,

[illegible]

HARBOR [illegible], a corporation,
garnishee.

[illegible]

MR. [illegible]

In a garnishment [illegible] in the [illegible] tried without a jury in December, 1930, resulting [illegible] against the garnishee, [illegible] Bank), for [illegible], and it appeals.

[illegible] 19, 1929, [illegible] after police [illegible] $1250.00 [illegible] in the [illegible] Inc., original [illegible] was placed in the [illegible] returned the [illegible] April 29, 1930, the [illegible] upon the Bank. [illegible] 1930, filed an answer in which [illegible] of the service of the [illegible] indebted to the [illegible] of said service [illegible] any funds, [illegible] Motor Co. [illegible]

On the trial [illegible] plaintiff, was in [illegible] conspiracy with the bank, [illegible]

bank four second-hand automobiles, and that thereafter the bank unlawfully sold them to a third party and received therefor the sum of $900, for which sum the bank is liable in this action. The theory of the Bank was in substance that early in February, 1930, before said judgment against the Motor Co. for $1238.25 had been entered and the execution placed in the bailiff's hands, the Bank, a large creditor of the Motor Co., lawfully obtained possession through an agent of the automobiles and thereafter lawfully sold them to a third party and credited the Motor's Co.'s indebtedness to it with the amount realized from said sale, and that the bank is not liable in this action in any sum. Plaintiff introduced certain documentary evidence and called four witnesses, - Roy E. Evans, cashier of the Bank, under section 33 of the municipal court act; C. L. Gilbert; Alfred E. Brandon; and a warehouseman named Van Sydow. Evans also was called as a witness for the Bank.

The following facts in substance were disclosed: Prior to February 3, 1930, the Motor Co. was engaged in an automobile business in Chicago, near the Bank. For a considerable time it had maintained a checking account in the Bank, from whom from time to time it also had borrowed money on its notes, partially secured by collateral. Early in January, 1930, it owed the Bank $6400. It also owed the Aetna Co. $1075, for which it gave its thirty-day judgment note, dated January 4, 1930, and by virtue of which said confessed judgment of February 17, 1930, subsequently was entered by the Aetna Co. The Motor Co. had other creditors, and prior to February 1, 1930, the Bank became aware of its financial embarrassments and sought to obtain further security from it for, or payments upon, said indebtedness of $6400. The Bank had ascertained that the Motor Co. owned and had in its possession the four second-hand cars, not encumbered by chattel mortgage. It determined to obtain a bill of sale of them from the Motor Co. (the sale to be made to an agent of

bank [illegible] second-hand automobile, and [illegible] . [illegible] unfortunately sold them to [illegible] party [illegible] sum of [illegible] , [illegible] action was the bank [illegible] theory of the Bank was in [illegible] before said judgment against the [illegible] entered and the execution plac[illegible] a large creditor of the bank [illegible] through an agent of the [illegible] them to a third party [illegible] to it with the amount realized from [illegible] not liable in this action [illegible] documentary evidence and [illegible] cashier of the bank, under [illegible] C. L. Gilbert; [illegible] Evans also was called as a witness [illegible]

The following facts [illegible] to February 6, 1930, [illegible] business in [illegible] maintained a checking account [illegible] time it also had borrowed money [illegible] collateral. [illegible] also owed the [illegible] judgment note, dated [illegible] contested judgment of [illegible] by the [illegible] February 1, 1930, [illegible] and sought to obtain further [illegible] said indebtedness of [illegible] Co. owned one [illegible] encumbered by mortgage. [illegible] made of them from the [illegible]

the Bank), and thereafter to sell them for what they would bring and to credit the Motor Co.'s indebtedness to it with the proceeds. About this time an arrangement to this end was made with C. L. Gilbert, who was a depositor in the Bank and who told Quinton, its vice president, that he thought he might be able to sell the cars for the Bank after he obtained possession. Interviews then were had with Hammerstrom, an officer of the Motor Co., and then in charge of its business (the president being absent), resulting in the Motor Co., by Hammerstrom, on February 3, 1930, in the Motor Co.'s office, delivering a bill of sale for the cars to Gilbert for the stated sum of $600, which Hammerstrom marked "paid". Evans, cashier of the Bank, who was present at the time of the transaction, testified that Hammerstrom directed that, when the cars subsequently were sold, the Motor Co.'s indebtedness to the Bank should be credited with the amount of the proceeds of the sale. Gilbert at the time paid no money for the cars. He delivered the bill of sale to Quinton and on the same day in the bank, signed and delivered to Quinton his (Gilbert's) note, payable to the Bank in 90 days. This note and bill of sale were placed with the other collateral which the Bank held as security for said indebtedness due to it from the Motor Co. On the same day (February 3, 1930), Gilbert having told Quinton that he had no place to keep the cars, Quinton, with Gilbert's consent, caused them to be delivered by employees of the Motor Co. to the place of business in the same vicinity of the Brandon Motor Sales (the name under which Alfred E. Brandon did his automobile business), which concern in turn caused them to be placed in a warehouse, also in the same vicinity. Warehouse receipts for them were issued in the name of, and delivered to, said concern on February 3rd. Gilbert made immediate efforts to sell the cars but without success. Quinton also entered into negotiations with Brandon, requesting him to purchase the cars and Brandon, prior to the entry of said confessed judgment, agreed to do

the Bank), [illegible]
and to [illegible] Co.'s [illegible]
about this [illegible]
Gilbert, who [illegible]
vice president, [illegible]
for the same [illegible]
had with [illegible]
of its business [illegible]
Co., by [illegible]
delivering [illegible]
or $600, which [illegible]
Bank, who was present [illegible]
Hammerstein [illegible]
Motor Co.'s indebtedness to the [illegible]
of the property of the [illegible]
the note. [illegible]
day in the bank, [illegible]
note, payable to the [illegible]
were place with the [illegible]
for sale in [illegible]
(February [illegible], 1919) [illegible]
to keep the [illegible]
delivered [illegible]
the same [illegible]
1919. [illegible]
caused [illegible]
warehouse [illegible]
to, said [illegible]
to sell the [illegible]
negotiations with [illegible]
Brandon, [illegible]

so at a price subsequently to be determined upon between them. About February 10, 1930, the Motor Co. went out of business. Prior to March 1, 1930, the Bank cancelled and returned Gilbert's $600 note to him and he destroyed it. On March 31, 1930, the Bank executed and delivered a bill of sale of the cars to Brandon, and on April 9th, received his check for $900, the price previously agreed upon for the cars, and on April 10th, Brandon received back the cars from the warehouseman. All these transactions occurred before the present garnishment suit was commenced. When this $900 was received by the Bank, it was credited to the Motor Co., on its account with the Bank. After all credits, from sale of collateral, etc., had been given to the Motor Co., including the credit for said $900, there was still a balance due from the Motor Co. to the Bank of $986.03, which the Bank subsequently "charged off".

During the trial, and while Evans as plaintiff's witness was being questioned as to the happenings on February 3, 1930, when the Motor Co. executed and delivered its bill of sale of the cars to Gilbert, plaintiff's attorney said: "Your Honor, * * I am trying to establish knowledge on the part of the Bank as to the condition of the Motor Co., * * and I am also going to show that this sale transaction was merely a sham, and that the Bank took these cars as its own property."

After a careful review of the present transcript we are of the opinion that the finding and judgment are against both the evidence and the law, and that the judgment cannot stand. Assuming that the Bank finally took possession of the cars, first through its agent, Gilbert, and thereafter sold them, there is no evidence that the Bank did so fraudulently. As it appears to us the Bank was only a vigilant creditor, whom "the law favors when no fraud is practiced." (Williams v. Andrew, 155 Ill. 93, 100.) ~~XXXXXXXXXXX~~. The Motor Co. owed the Bank at the time more than $6,000, not fully

secured by collateral, and, even if it was in fact insolvent at the time and known to the bank to be such (which the evidence did not disclose) it had a clear right under the law to make a preference to the Bank, provided it did so in good faith and not fraudulently as to other of its creditors. (Nelson & Co. v. Leiter, 190 Ill. 414, 422; Third National Bank v. Morris, 331 Ill. 230, 233-4; Bump on Fraudulent Conveyances, 3rd Ed., pp. 187-9; Holt Mnfg. Co. v. Bennington, 73 Wash. 467, 473.) And what is said in the Bennington case (p. 473) is, we think, peculiarly applicable to the facts in the present case, as showing that no fraud was practiced upon the Aetna Co., viz: "In the present case there was no evidence that the debts preferred were not real, that the payment was not actual, nor that the consideration was inadequate. There was no evidence whatever that the transfer was to be used merely as a colorable consideration to protect the debtor's property from the appellant's claim, or to hinder its collection. There was no trust for the benefit of the debtors." Plaintiff's counsel place considerable reliance on the holdings and decision in Zwick v. Catavenis, 331 Ill. 240, 247-8, but in that case it appears that there was a secret trust for the benefit of the debtor. The Court said (p. 247): "Where a transfer is made by an insolvent debtor preferring a creditor, by which transfer a secret trust is created for the benefit of the debtor, such conveyance, though absolute on its face, is fraudulent and void as to creditors. The natural and necessary effect of such a transfer is to mislead, deceive and defraud creditors." It is apparent that the Zwick case holdings and decision are not in point under the facts of the present case. And it is not claimed, and there is no evidence showing, that the sale of the four cars was in violation of the Bulk Sales act of this state.

The judgment appealed from is, accordingly, reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

Kerner and Scanlan, JJ., concur.

35141

FINDING OF FACTS.

We find as facts in this case that the sale and delivery of the four second-hand automobiles by the plaintiff, Walsh Motors, Inc., on February 3, 1930, to the defendant, Harbor State Bank, direct or through its agent, Gilbert, was a bona fide one, made for the purpose of paying or securing, pro tanto, an actual debt then due from the plaintiff to said bank; and that in the making of said sale no fraud was practiced upon the Aetna Acceptance Co., then also a creditor of said Walsh Motors, Inc.

35150

MADISON-KEDZIE TRUST & SAVINGS BANK, a corporation,
Appellee,

v.

A. J. DEAN,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

On December 12, 1930, plaintiff caused a judgment by confession in the sum of $5303.43, to be entered against defendant upon his collateral judgment note, dated September 25, 1930, payable in 30 days to the order of the Madison-Kedzie State Bank, and by it indorsed, for the sum of $15,793.40, bearing interest from date at the rate of 6 per cent per annum. Plaintiff alleged in its declaration that the sum of $10,900 had been "paid" on the note, leaving a claimed balance due of $4,893.40 and certain interest. The amount of the judgment as confessed is made up of said balance, interest and $325 as attorney's fees. On January 2, 1931, defendant appeared and moved that the judgment be opened, that he be given leave to plead, and that there be a trial upon the merits, etc. The motion was supported by his affidavit. Thereafter he was given leave to file, and filed, an amended affidavit. On January 31, 1931, the court, after considering the amended affidavit and hearing arguments of respective counsel, denied the motion that said judgment be opened, etc., and defendant appealed.

Defendant's amended affidavit contains the following allegations in substance:

That on December 26, 1930, he was served with an execution on the judgment; that the statement in plaintiff's declaration that he had "paid" on the note the sum of $10,900 is "untrue"; that prior to his execution of the note, and during

MAILOW-K [illegible]
BANK, a corporation,
[illegible]

[illegible]

A. J. [illegible],
[illegible]

MR. [illegible]

[illegible] in December 1[illegible], [illegible] by
confession in the sum of [illegible], [illegible]
set upon his collateral [illegible]
payable in [illegible] days to the order of [illegible] Bank [illegible],
and by it indorsed, [illegible]
from date [illegible]
in the [illegible] than [illegible]
note, leaving a balance [illegible]
interest. [illegible]
said balance, interest [illegible]
[illegible] 1921, [illegible]
that he [illegible]
the market, etc. [illegible]
Thereafter he was given [illegible]
days. [illegible]
amended [illegible] and bearing [illegible]
denied the action [illegible]
appeals.

[illegible]

allegations in question:

That [illegible]
execution on the judgment [illegible]
declaration [illegible]
in "[illegible]" [illegible]

the months of May and November, 1926, he purchased from said Madison-Kedzie State Bank (hereinafter called the State bank) $18,500 worth at par value of certain building bonds described in the note; that it then was represented to him by authorized agents of the bank that the bonds "were 100% safe," that the bank had examined the property of each particular bond issue, and that the equity therein "was at least 50%;" that it was then agreed that if he (defendant) should at any time desire to sell the bonds for cash "the bank would take them back at a discount of 1%, and (three years) thereafter at par, plus accrued interest," and that it would "at all times loan to him as high as 90% on the bonds and take them from him as collateral to the loan;" that relying upon these representations, he paid the par value of each of the bonds and the bank in writing agreed that it "would repurchase said bonds at any time after three years at par plus accrued interest;" that thereafter the bank made a loan to defendant and "took the bonds as collateral security," and that from time to time "the loan was extended and new notes substituted for the original note and that the present note, upon which the confession was entered, was a renewal note for the original loan made pursuant to said agreement;" that the State bank ceased to do a banking business on February 10, 1930; that "in order to escape numerous liabilities on similar agreements" as well as on said agreement with defendant, it had caused to be organized a new bank under the name of Madison-Kedzie Trust & Savings Bank (hereinafter called the "new" bank); that the new bank took over all the assets and property of the State bank together with the good will of its business; that among these assets were defendant's said note and collateral; that the new bank (plaintiff) is now in possession of all of the assets of the State bank; that it "paid no consideration for the taking over of said assets;" that it is conducting "a part of its business" under the name of the State bank, and "has co-mingled its affairs and business with the former institution for the purpose of acquiring all of its assets and escaping its liabilities under the contract with this defendant, as well as under other similar contracts and obligations;" that while the State bank had ceased to do a banking business and had surrendered its business and assets to the new bank, yet, for the purpose of making it appear that it is an innocent purchaser for value, said new bank had caused collateral notes to be printed in the name of the State bank as payee; that as late as September 25, 1930, it caused defendant to sign a renewal collateral note to the State bank as payee, "well knowing that said institution no longer existed," and caused the note to be endorsed by said State bank to it, but that in fact no consideration was paid by it for said endorsement, and that plaintiff (the new bank) "at all times knew of the terms and conditions under which this defendant had purchased said bonds and procured said loan;" that while defendant was only obligated on said note for the amount of $15,793.40, the new bank (plaintiff), "having notice of said agreement" between the payee of note (State Bank) and this defendant as to the repurchasing of the bonds at par plus accrued interest by said State bank, "caused all of said bonds to be sold without notice to this defendant and at a price unknown to him;" that the payment that appears on the note in the sum of $10,900 "represents some of the proceeds it claims to have received from the sale of said bonds," but this defendant states that "he never received any notice of the sale of the bonds, or of the amount produced therefrom," and that, under the terms of the agreement, "it was plaintiff's duty to sell said bonds at not less than the par value thereof, which was in excess of the amount due to it on said note, and to account to defendant for the balance above the

[illegible]

ooo.

amount due to it on said note, which it failed to do;" that the sale was made "with the intent and purpose to defraud this defendant of the amount due to him on said bonds;" and that by reason of the foregoing facts "the entire obligation due to plaintiff was paid and discharged, and there was nothing due and owing from this defendant to the plaintiff on the date when said confessed judgment was entered." Defendant further stated that he makes this affidavit for the purpose of having said judgment opened and for a trial upon the merits before a jury, and for leave to be allowed "to file a setoff for the amount due him."

After carefully reviewing the allegations in the affidavit we are of the opinion that it states prima facie a good and meritorious defense to the note or claimed indebtedness sued upon, and that the court erred in not opening the confessed judgment and allowing defendant to plead, etc. It is held in Freedman v. Madison & Kedzie State Bank, 259 Ill. App. 519, that an agreement of a banking corporation selling bonds (such as is alleged in said affidavit), to repurchase under certain conditions the bonds sold, is a valid and enforceable agreement. And, although it appears from the affidavit that the alleged agreement in the present case was made between the state bank and defendant, it also appears prima facie that the new bank (plaintiff) had notice of said agreement and was not an innocent purchaser for value when the note was indorsed to it. Indeed, it appears that it had merely, so to speak, stepped into the shoes of the state bank and was continuing or carrying on its business. And it further sufficiently appears prima facie that the new bank (plaintiff), because of said agreement, had no legal right, without notice to defendant, to sell said collateral for $10,000 and claim the balance of $4,893.40 to be due upon the note. Plaintiff's counsel here make certain technical points as grounds justifying the refusal of the trial court to open the judgment and allow a trial upon the merits. We have considered all of them and believe them to be without substantial merit.

Accordingly, the order of the superior court, denying defendant's said motion, is reversed, and the cause is remanded to the superior court with directions to open the judgment (the same to stand as security) and to allow defendant to plead to the merits and to have a trial, etc.

REVERSED AND REMANDED WITH DIRECTIONS.

Kerner and Scanlan, JJ., concur.

35359

FINE HING COMPANY, a Corporation,
and JOE ENG,
Appellees (complainants),

v.

CITY OF CHICAGO, ANTON J. CERMAK, its
Mayor, and other of its Officials,
Appellants (defendants).

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT
OF COOK COUNTY.

263 I.A. 647

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from an order of the superior court, entered July 21, 1931, denying their motion (after the court had considered their answer and heard arguments of counsel) to dissolve a temporary injunction issued against them after notice on June 18, 1931, immediately following the filing of complainants' bill. Complainants have not here entered an appearance or filed a brief and argument. In the injunctional order all defendants, their agents, servants, etc., were temporarily enjoined

"from posting or placing police officers, at the entrance or in the premises of said Fine Hing Company at 3813-3829 West Madison Street, Chicago; from closing or attempting to close the restaurant of said Fine Hing Company,—the 'Golden Pumpkin'; from prohibiting the people from patronizing the restaurant; and from doing or committing any act tending or calculated to hinder, molest, or interfere with the lawful operation of said Fine Hing Company, excepting in a lawful manner and by due process of law and for a lawful purpose and intention, until the further order of this court."

In the bill it is alleged that Fine Hing Company is an Illinois corporation, organized on September 20, 1926, and having for its objects the operating of a restaurant and cafe and the conducting of a cabaret and dining hall; that Joe Eng is the president of the company; that it entered into a lease of the premises, known as 3813-3829 W. Madison street, Chicago, and since March 15, 1927, has there been conducting a restaurant; that people of Chicago are its patrons and it serves meals to the public; that the premises are improved with tables, chairs and other usual equipment; that for many years it has been the practice in Chicago, in high class

[illegible] LIKE [illegible] Party, a corporation,
and JOE [illegible],

Appellees (defendants),

v.

CITY OF [illegible], [illegible] [illegible] Ave, [illegible]
Mayor, and other of the [illegible],

Appellants (defendants).

[illegible]

Mr. Presiding Justice [illegible]

This is an appeal [illegible] order of the superior court, entered [illegible] the court had considered [illegible] to dissolve a temporary injunction [illegible] on June 16, 1921, [illegible] bill. Complainants have not [illegible] brief and argument. In the [illegible] appeals, warrants, etc., were [illegible]

"from poetic or erotic [illegible] promises of said film company [illegible] Chicago; from clowning or attempts [illegible] film company,—the 'action' [illegible] from patronizing the [illegible] not taking or calculated to [illegible] lawful operation of said film [illegible] manner and by the process of law [illegible] tention, until the further order of [illegible]."

In the bill it is [illegible]

Illinois corporation, organized [illegible] for its objects the operating, or [illegible] duction of a concert and [illegible] of the company; that it [illegible] as 3311-3320 S. [illegible] has there been conducting a [illegible] the patrons and it serves [illegible] improved its habits, [illegible] many years it has been [illegible]

restaurants, to furnish music and other entertainment, such as singing, etc., during the course of the serving of meals, and also to provide a small space upon which patrons may dance; and that the company has conformed with this practice, and has in the past, and is now, conducting its restaurant in a lawful and proper manner.

It is further alleged that the company has heretofore paid to the City, in the years 1927, 1928, 1929 and 1930, a license fee as a "public place of amusement," which fee has been assessed at $1,000 per year on a seating capacity of 2265 persons and a floor space of 13,593 square feet, but that the "dance floor" in the premises is only 2,000 square feet; that the company has paid personal property taxes and a franchise tax; and that it has also paid cigarette license fees and inspection fees for electric signs, electric motors, ventilating equipment, etc., as provided by divers ordinances of the city.

It is further alleged that the city, through its Mayor, its acting commissioner of police, a certain named captain of police and "divers police officers and agents," have demanded that complainants pay to the City a license fee for the year 1931, in the sum of $1,000 for the operation of said restaurant, under an ordinance of the City in part as follows:

"Section 202. The term 'public place of amusement,' as used in this article, shall be construed to include and to mean any building, hall, room, place or enclosure, where food or drink is served, to which the general public may be admitted either with or without the payment of a charge or admission fee, and where such public may engage in or witness the performance of any theatrical entertainment, show, amusement, dance, skating, or entertainment other than musical.

Section 203. No person, firm or corporation shall manage, conduct, operate, or carry on a public place of amusement without first having obtained a licence therefor.

Section 207. The annual license fee for each public place of amusement shall be graded according to size and capacity as follows: Where such place has a floor space not exceeding 1200 square feet, with a seating capacity not exceeding 150 persons, the annual license fee shall be $250; (Here follow provisions as to the amount of the fee where the floor space and the seating capacity are greater); for the next larger grade, with floor space exceeding

restaurants, [illegible] music [illegible] or operation [illegible], and [illegible] ing, etc., during the course of the [illegible] [illegible] to provide a small [illegible] upon [illegible] [illegible]; [illegible] the company has conformed with this practice, [illegible] [illegible], and is now, conducting its restaurant [illegible].

It is further alleged [illegible] paid to the city, in the years 1[illegible], 1[illegible], 1[illegible] and 19[illegible], a license fee as a "public place of amusement," [illegible] has been assessed at $1,[illegible] per year on a [illegible] [illegible] at $[illegible] [illegible] floor space of 1[illegible],[illegible] square feet, [illegible] "[illegible]" in the premises is only 3,[illegible] square feet; [illegible] paid personal property taxes and a [illegible] tax; [illegible] paid cigarette license fees and [illegible] electric motors, ventilating equipment, etc., [illegible] by diverse ordinances of the city.

It is further alleged [illegible], [illegible] the acting commissioner of police, [illegible] police officers [illegible] commissioners per [illegible] the City a license fee [illegible], in the sum of $1,[illegible] for the operation of said restaurant, under [illegible] ordinance of the City in such [illegible].

"Section [illegible]. The term 'public [illegible]' [illegible] used in this article, shall be construed to [illegible] building, hall, room, [illegible] [illegible] served, to which the general public may be [illegible] without the payment of a charge or when such fee, [illegible] public may engage in or witness the performance of any theatrical entertainment, play, exhibition, [illegible] other than medical.

Section [illegible]. No person, firm [illegible] manage, conduct, or carry on a public place of amusement [illegible] without having obtained a license therefor.

Section [illegible]. The annual license fee for [illegible] place or museum shall be [illegible] in [illegible] an [illegible]: Where such place [illegible] a floor [illegible] square feet, with a seating capacity not [illegible], the annual license fee shall be $[illegible]; (here follow provisions as to the amount of the fee where the floor space [illegible] greater); for the most larger grade, with floor space exceeding

7500 square feet and seating capacity exceeding 1,000 persons (the annual license fee shall be) $1,000. In computing floor space for the purposes hereof all space used for entertainment or restaurant purposes, all aisle space, space between walls and the partitions of such space, together with all balcony space, shall be computed."

The bill does not set forth other sections of the article, viz., sections 204, 205, 206, 208, 209 and 210. These last mentioned sections are set forth in defendants' answer. Two of them are as follows:

"204. Application for license--special requirements). The application for such license for the business of managing, conducting, operating or carrying on a public place of amusement shall conform to the general provisions of this ordinance relating to applications for licenses, and shall specify the location of the building or place in which it is proposed to keep such public place of amusement, the number of square feet of floor area and the seating capacity of such building or other place. Every such application shall be approved by the superintendent of police, the commissioner of buildings and the commissioner of health before a license shall be issued.

210. Penalty). Any person, firm or corporation that shall violate any of the provisions of this article shall be fined not less than ten nor more than two hundred dollars for each offense, and each day such violation continues shall be regarded as a separate offense."

The bill further alleges that neither the city nor its police officers inspect said restaurant, other than by inspections heretofore mentioned for which separate fees have been paid; that said section 207, in providing for a license fee, "is in truth and in fact providing for revenue and grossly in excess of any and all proper inspection fees that could be levied or incurred by reason of inspection or rights incurred in the regulation of the business of said Fine Ming Company"; that sections 202, 203 and 207, "are invalid and void as being outside the powers conferred upon the city council by the legislature of the State, and are indefinite and uncertain and in violation of the constitutional requirements in regard to uniformity of taxation"; and that complainants "have protested" against the levying of an assessment or license fee for the year 1931 in the sum of $1,000.

7500 square feet and nothing concerning a 1,000 person (the annual license fee equal to $1,000). In connecting floor space or the purchase thereof all space, and for entertainment or restaurant purposes, all aisle space, space between seats and the aisles and of such space, together with all balcony space, shall be required."

The bill does not set forth other sections of the article, viz., sections 304, 305, 306, 307, 308 and 309. These last mentioned sections are not terse in their wording however. Two of them are as follows:

"304. Application for license--seating capacity, etc.--The application for such license for the conducting of such building, conducting, operating or carrying on a public place of amusement shall conform to the general provisions of this article relating to applications for licenses, and shall specify the location of the building or place in which it is proposed to open such public place of amusement, the number of square feet of floor area, the seating capacity of such building or place, the kind of public amusement shall be approved by the superintendent of police, the commissioner of buildings and the commissioner of health before a license shall be issued.

310. Penalty. Any person, firm or corporation that shall violate any of the provisions of this article shall be fined not less than ten nor more than two hundred dollars for each offense, and each day such violation shall continue shall be regarded as a separate offense."

The bill further alleges that neither the city nor its police officers imposed said restraint, other than by prosecutions heretofore mentioned for a non-separate issue of the law; that said section 307, in providing for a license fee, is in truth and in fact providing for revenue and property in excess of and of proper inspection fee that could be given or imposed by reason of inspection or rights incurred in the operation of the business of said Nine King Company"; that sections 304, 305 and 307, "are invalid and void as being outside the power of contract and unlawfully assumed by the legislature of the state, and in violation and uncertain and in violation of the general constitutional provisions in regard to municipality of taxation"; and that complainants "were prosecuted" against the levying of an assessment or license fee for the year 1931 in the sum of $1,000.

It is further alleged that defendants, including said captain of police and divers police officers, "have threatened to force the closing of the doors of said premises, ** wherein the business of the Fine Hing Company is now being conducted, and do now threaten to place police officers at the entrance of the premises to prohibit people from entering upon said premises and patronizing said restaurant"; that said captain of police, Patrick J. Collins, "has this day issued orders to his subordinate police officers to close the premises, and to prohibit people from patronizing them, with force of arms if necessary, and contrary to the peace and dignity of said City and State"; and that complainants fear and believe that said orders will be carried into execution.

It is further alleged that the co-complainant, Joe Eng, has, on complaint of the city, "been placed in jail and been fined," and that "divers other arrests have been threatened."

It is further alleged that the complainant company "enjoys a fine reputation in the city," that its restaurant always remains open during the day to serve the people and that its business is based upon the good will of those it serves, and upon its continuing in business; that large numbers of people daily patronize the restaurant; and that, if said premises be closed as threatened, the damages thereby suffered by the company will be large and irreparable.

It is further alleged that the company is willing to pay "any fair and reasonable fee" for the purpose of regulating its business or an inspection thereof, but that it "<u>has declined to pay</u> this <u>arbitrary</u> amount of $1,000;" and that "it now tenders the sum of $100, as being a fair and reasonable license and regulatory fee, or such other proper fee as will upon due inquiry be ascertained."

The prayer of the bill is t at defendants, their agents, etc., be perpetually enjoined from assessing, levying or demanding a

It is further alleged that [illegible], threatening said captain of police and divers police officers, "were ordered and to force the closing of the doors of said premises, to wreck the business of the Slot Club Company is now being conducted, and to now threaten to close police officers in the enforcement of the present to prohibit people from entering, from said premises and enjoining said restaurant"; that said [illegible] of police, [illegible] Collins, "has this day issued orders to his subordinate police officers to close the premises, and to prohibit people from patronizing them, with force of arms if necessary, and contrary to the peace and dignity of said City and State"; and that complainants fear and believe that said orders will be carried into execution.

It is further alleged that the [illegible], the King, has, on complaint of the city, "been placed in jail and been fined," and that "divers other arrests have been threatened."

It is further alleged that the [illegible] "employs a fine regulation in the city," that its restaurant always remains open during the day to serve the people, and that its business is free, upon the good will of those in charge, and upon its continuing in business; that large numbers [illegible] patronize the restaurant; and that, if said premises be closed or restrained, the damages thereby suffered by the company will be large and irreparable.

It is further alleged that [illegible] to pay "any fair and reasonable fee" for the [illegible] of transacting its business or an inspection thereof, but that [illegible] "has imposed a fee of this arbitrary amount of $1,000;" and that "it has fixed the sum of $100, as being a fair and reasonable license or regulation fee, or such other proper fee as will meet the liberty to accomplish."

The prayer of the bill is [illegible] etc., be perpetually enjoined from [illegible] etc.

license fee of $1,000; from instituting civil or quasi-criminal suits against complainants in the municipal court of Chicago for the purpose of collecting a license fee; from entering upon the premises for the purpose of prohibiting people from patronizing said "Golden Pumpkin" restaurant; from the use of force or threats to compel complainants to cease operating said restaurant, and from committing any other acts calculated to hinder or interfere with the operation of the restaurant; and that complainants may have such other and further relief as equity may require, etc. Complainants also prayed for a temporary injunction, pendente lite, under such terms and conditions as the court should deem proper.

In defendants' answer some of the allegations of the bill are admitted and some are denied. Defendants admit that complainant company, for the years 1927-8-9 and 1930, paid each year a license fee of $1,000 for a "public place of amusement," and that such fees were assessed at that sum on a seating capacity of 2265 persons and a floor space of 13,593 square feet; and they allege that such fee was properly assessed and collected in accordance with the terms of the ordinance mentioned in the bill. As to the allegations in the bill concerning the payments of the inspection fees, other taxes, etc., defendants allege that, if paid, they were properly assessed and paid for additional privileges conferred upon it, and that the assessment and payment of the same are not material to the issue involved in the present cause. As to the allegations concerning the City's demands, through its officers or agents, defendants deny that the City has demanded the payment of a license fee of $1,000 for the year 1931 for the operation of the restaurant, but defendants admit that the City, through its proper agents, has demanded of the complainant company that it apply for, pay for and procure a license for said year, in accordance with the terms of the

license fee of $1,000; from instituting civil or quasi-criminal suits against complainants in the municipal court of Antioch for the purpose of collecting a license fee; from entering upon the premises for the purpose of prevent illegal music from patronizing said "Golden Dragon" restaurant; [illegible] use of force or threats to compel complainants to cease operating said restaurant, and from committing any other acts calculated to hinder or interfere with the operation of the restaurant; and also enjoining a very [illegible] such other and further relief as equity may require. [illegible] complainants also prayed for a temporary injunction, pending the [illegible] under such terms and conditions as the court should deem proper.

In defendants' answer some of the allegations of the bill are admitted and some are denied. Defendants admit that complainant company, for the years 1927-29 and 1930, paid each year a license fee of $1,000 for a "public place of amusement," and that such fees were assessed at that sum on a seating capacity of 2500 persons and a floor space of 13,093 square feet; and they allege that such fee was properly assessed and collected in accordance with the terms of the ordinance mentioned in the bill. As to the allegations in the bill concerning the payments of the license fee, other taxes, etc., defendants allege that, if such, they were erroneously assessed and paid for additional privileges conferred upon it, on that the assessment and payment of the same is not material to the issue involved in the present cause. As to the allegations concerning the City's demurrer, they admit the allegations, but deny that the City has demanded the payment of a license fee of $1,000 for the year 1931 for the operation of the restaurant, but defendants admit that the City, through its proper agents, has demanded of the complainant company that it apply for, and pay for, and procure a license for said year, in accordance with the fee of the

ordinance; and defendants allege that the company, notwithstanding its legal duty so to do, has refused, and still refuses, to comply with said ordinance by procuring a license for said year.

Further answering, defendants deny that the City, through its proper officials or agents, do not inspect the restaurant and place of amusement of the company; deny that section 207 of the ordinance, wherein is the provision for the payment of an annual license, as graded, is "in truth and in fact providing for revenue and grossly in excess of any and all proper inspection fees that could be levied and incurred," etc., as alleged in the bill; deny that sections 202, 203 and 207 of the ordinance are, as alleged, "invalid and void as being outside the powers conferred upon the city council by the legislature of the State, and are indefinite and uncertain," etc., and allege that "complainants are attempting to operate their said public place of amusement without a license for said year and contrary to law," and that by reason thereof complainants, and each of them, "are in this court of equity with unclean hands and that they are not entitled to any relief."

And defendants allege that, because of complainants' failure and refusal to comply with the provisions of the ordinance by procuring a license for the year 1931, the City instituted proceedings at law, under section 210 of the ordinance, in the municipal court of Chicago, against said Joe Eng, to compel him and his said corporation, Fine Hing Co., to procure a license for said year and pay the fee therefor; that during the months of May and June, 1931, and on different days, the City caused to be filed in said municipal court ten (10) separate complaints against said Eng, each charging him with operating said place of amusement without a license; that warrants were duly issued on the complaints; that Eng appeared and on June 17, 1931, (the day before the present bill was filed and

ordinance; and defendants in error [illegible], [illegible] mandatory
its legal duty so to do, then [illegible], and [illegible] a [illegible]
with said ordinance by procuring [illegible] license.

Further answering, [illegible]
through its proper [illegible] or [illegible], [illegible]
rant and place of business or the [illegible]
of the ordinance, wherein is the [illegible] [illegible]
annual license, as granted, is "in trust and is [illegible]
revenue and property in excess of [illegible]
that could be levied and incurred," etc., [illegible]
deny that sections 202, [illegible] of the [illegible]
legal, "invalid and void as being [illegible]
the city council by the legislature of the state, [illegible]
nize and authorize," etc., [illegible]
ing to operate their self public [illegible] a license
for said year and contrary to law," [illegible]
plaintiffs, and then of them, "are in [illegible] or [illegible]
clean hands and that they are not entitled to [illegible]."

And before [illegible] allege [illegible], [illegible]
failure and refused to comply with the [illegible]
by procuring a license for the year 1931, [illegible]
ceeding at law, under section 211 of the [illegible], in the [illegible]
court of Chicago, against said defendants, [illegible]
corporation, [illegible], to procure a [illegible] year and
pay the fee therefor; that during the month [illegible] June, 1931,
and on different days, the city caused to [illegible] in said municipal
court ten (10) separate complaints against said [illegible], each charging
him with operating said place of amusement without a license; that
warrants were duly issued on the complaints; that the defendants and
on June 17, 1931, (the day before the present [illegible] was [illegible]

the injunction in question issued) said causes were tried in the municipal court and resulted in a finding of guilty against Eng and the entry of a judgment against him in each case, imposing a fine upon him of $10, together with costs; and that no appeal was taken from any of the judgments, and subsequently Eng paid the fines.

Further answering, defendants admit that large numbers of people patronize complainants' place of amusement, but deny that the damages ensuing from a closing of the premises are irreparable, and allege that if any damage or injury has been suffered by complainants by reason of defendants' actions in attempting to enforce the ordinance, "it is damnum absque injuria." And defendants allege that complainants have not made application for a 1931 license, and "have not paid or tendered any fee for said year"; that "a court of equity will not assume jurisdiction for the purpose of permitting or assisting complainants, or any other persons, to violate the laws or ordinances of the City of Chicago;" and that they (defendants) have the right to prevent the further unlawful operation of said place of amusement until the ordinance is complied with.

After carefully reviewing the provisions of the ordinance in question, the allegations of complainants' sworn bill, as well as the averments in defendants' answer (which were considered by the court on the motion to dissolve the temporary injunction), we are of the opinion that the bill does not state such a case as warranted the issuance of such an injunction in the first instance, that the same was issued improvidently and without authority of law, and that the court, on defendants' motion to dissolve, erred in not dissolving the same.

In section 41 of Article V of the Cities and Villages Act (Cahill's Stat. 1929, p. 329) our legislature has given to the City of Chicago the express power "to license, tax, regulate, suppress

the injunction in question issued) suit cannot be taken in the municipal court and resulted in a finding of nullity [illegible] the entry of a judgment against [illegible], [illegible] a fine upon him of $10, together with costs; and [illegible] from any of the defendants, and other [illegible] [illegible].

Further [illegible], there is [illegible] of people petitioning consideration' [illegible], for they that the language emanating from [illegible] and effect that if any change or injury [illegible] suffered by complainants by reason of defendants' [illegible] in enforcing the ordinance, "it is [illegible]." And defendants allege that complainants have not made application for a [illegible] license, and "have not paid or tendered any fee for said license"; that "a court of equity will not assume jurisdiction [illegible] enjoining or enjoining complainants, or any other persons, to violate the laws or ordinances of the City of Chicago;" and that they (defendants) have the right to prevent the further unlawful operation of said [illegible] of management until the ordinance is complied with.

After carefully reviewing the [illegible] of the ordinance in question, the allegations of [illegible] complaints' [illegible], as well as the arguments in defendants' answer (which were [illegible] the court on the motion to dissolve the temporary injunction), we are of the opinion that the bill does not state [illegible] the issuance of such an injunction in the first instance, [illegible] the case was issued improvidently and it not [illegible] the court, on defendants' motion to dissolve, [illegible] the case.

In section 21 of article V of [illegible] Act (Smith's Stat. 1920, p. 190) our legislature [illegible] the City of Chicago the express power "to license, tax, regulate, prevent

and prohibit ** theatricals and other exhibitions, shows and amusements **." It has been held that a public dance is a public amusement (Chicago v. Green Mill Gardens, 305 Ill. 87, 93). Complainants' bill discloses that at their restaurant, cabaret, etc., public dancing is provided for and indulged in, and that their premises are a "public place of amusement," as defined in section 202 of the city ordinance, set forth in the bill. By sections 203 and 207 of the ordinance, also set forth in the bill, it appears that it is unlawful for any person or corporation to operate or carry on a public place of amusement "without first having obtained a license therefor," that licenses shall be taken out annually and a prescribed license fee, graded and based upon floor space and seating capacity, shall be paid each year, and that where the place of amusement has a floor space exceeding 7500 square feet and a seating capacity exceeding 1,000 persons, the annual license fee shall be $1,000. Complainants' bill further discloses that they are now operating their public place of amusement without a license and without authority of law and that they are seeking the aid of a court of equity to enable them to continue their unlawful operation of the same. A court of equity cannot properly grant them such relief. (Chicago v. O'Hara, 124 Ill. App. 290, 299; Vitagraph Co. v. Chicago, 209 id. 591, 594; Rockford Amusement, etc. Co. v. Baldwin, 252 id. 1, 4). Furthermore, complainants, having paid the license fee for four successive years as fixed by the city ordinance and having refused to procure a license and pay the license fee for the year 1931, come into a court of equity, seeking relief, with unclean hands. (Modern Horse Shoe Club v. Stewart, 242 Mo. 421, 428-9). Furthermore, complainants having refused to take out a license for the year 1931, and having continued in the operation of their public place of amusement unlawfully, we think that the City and its

and probity of theatrical [illegible] ... [illegible] ... ments." It has been held that a public sale is a public amusement (Gibson v. Green Hill Gardens, [illegible] 111. App. [illegible]). Complainants' bill discloses that at their restaurant, cabaret, etc., public dancing is provided for and indeed [illegible] are a "public place of amusement," as defined in section [illegible] of the city ordinance, set forth in the bill. By sections [illegible] of the ordinance, also set forth in the bill, it appears [illegible] unlawful for any person or corporation to [illegible] a public place of amusement "without first [illegible] a license therefor," that licenses shall be issued [illegible] a prescribed license fee, graded and based upon floor [illegible] and [illegible] shall be paid annually, and that where the floor of a place of amusement has a floor space exceeding 7500 square feet [illegible] annually exceeding 1,000 persons, the annual license fee shall be [illegible]. Complainants' bill further [illegible] that their public place of amusement [illegible] a license [illegible] authority of law and [illegible] they are seeking [illegible] of equity to enjoin the [illegible] thereof [illegible] same. A court of equity cannot properly [illegible] (Gibson v. Chase, 194 Ill. App. 390, [illegible]; [illegible] 328 Ill. 1, [illegible]). Furthermore, [illegible], [illegible] license fee for their amusement place [illegible] and [illegible] anything referred to [illegible] the license fee for the year 1931, even into a court of equity, [illegible] unless [illegible] (Chicago Park Dist. v. [illegible], [illegible] 180-[illegible]). Further, [illegible] the year 1931, and [illegible] the operation of a dance hall [illegible] use of [illegible] and [illegible] the city and its

authorized agents have the clear right and power to prohibit, by all lawful means, the continued unlawful operation of said place of amusement. (Film Classics v. Dever, 234 Ill. App. 614, 616; Haggenjos v. Chicago, 336 Ill. 573, 576-7). In the last cited case it is said: "It has been said often that the power to regulate does not include the power to prohibit; and this is true in the sense that mere regulation is not the same as absolute prohibition. Regulation of business or action implies the continuance of such business or action, while prohibition implies its cessation. On the other hand, the power to regulate implies the power to prohibit except upon the observance of authorized regulation."

The superior court erred in not dissolving, on defendants' motion, the temporary injunction in question, and, accordingly said injunctional order of July 21, 1931, is reversed.

REVERSED.

Kerner and Scanlan, JJ., concur.

authorized agents have the law with and power [illegible], by all lawful means, the continued [illegible] [illegible] management. (Mike Glenwood v. [illegible], [illegible] [illegible], [illegible]; Hasenauer v. [illegible], [illegible] [illegible], 273-77). [illegible] it is said: "It has been not [illegible] that the [illegible] does not indicate the power is [illegible]; [illegible] [illegible] some that mere regulation is [illegible] [illegible] [illegible]. Regulation of business or [illegible] [illegible] business or action, while [illegible] [illegible]. On the other hand, the power to regulate [illegible] [illegible] prohibit except when the [illegible] [illegible].

The superior court [illegible] [illegible] defendants' motion, the temporary [illegible] [illegible], accordingly with instructions [illegible] [illegible], [illegible], [illegible].

[illegible]

Latner and [illegible], [illegible], [illegible].

35604

MAX M. COHN,
Complainant,

v.

HERMAN WEISSMAN et al.,
Defendants.

FOREMAN-STATE NATIONAL
BANK OF CHICAGO,
Cross-Complainant.

On appeal of HERMAN S.
STRAUSS, trustee,
Appellant.

887

263 I.A. 647

APPEAL FROM INTERLOCUTORY ORDER OF SUPERIOR COURT OF COOK COUNTY, APPOINTING A RECEIVER.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by Herman S. Strauss, as trustee under a first trust deed on certain improved premises in Chicago, claiming to be in possession of the premises through sub-agents, from an interlocutory order of the superior court (entered on July 16, 1931, in a suit instituted by Max M. Cohn to foreclose a second trust deed) appointing Howard K. Hurwith as receiver pendente lite of the premises and of the rents and profits thereof.

Complainant, in his verified bill filed July 10, 1931, alleged in substance that on July 28, 1928, Herman Weissman and Rose Weissman, his wife, executed and delivered their 66 notes, payable at stated times thereafter and aggregating $36,000; that the last notes matured on May 20, 1931; that to secure all of the notes the Weissmans executed and delivered a second trust deed on the premises, running to Charles L. Cohns, trustee, dated July 28, 1928, and duly recorded; that many of the notes have not been paid; that

MAX K. [illegible],
Complainant,

v.

HERMAN [illegible] et al.,
Defendants.

YORKWAY-[illegible] LOAN &
BANK CO. [illegible],
Cross-Complainant,

On appeal of [illegible]
STRAUSS, trustee,
Appellant.

MR. [illegible]

This is an appeal by [illegible], as trustee under a first trust deed on certain [illegible], claiming to be in possession of the premises [illegible] from an interlocutory order of the [illegible] in a suit instituted by [illegible] to foreclose a [illegible] deed) appointing Howard K. [illegible] as trustee under [illegible] of the premises and of the rents, [illegible].

Count Ward, [illegible] alleged in substance that [illegible] base [illegible], [illegible] payable on [illegible] last note matured on [illegible] the note [illegible] premises, [illegible] and duly recorded; [illegible] that

complainant is the legal holder and owner of notes 18 A to 33 A, inclusive (aggregating $14,600), all of which are past due and unpaid; and that the premises are improved with a brick apartment building, containing about 50 furnished apartments, and are encumbered by another and prior trust deed, dated September 15, 1926, securing a present indebtedness of about $125,000, and running to Herman S. Strauss, as trustee. Only the two Weissmans and Charles L. Cohns, trustee, were made parties defendant to the bill, which prayed for a foreclosure of said second trust deed and for the appointment of a receiver pendente lite.

On July 11, 1931 (the day following the filing of the bill), after notice to the Weissmans only and upon complainant's motion, the court granted leave to him to file a petition in support of his motion for a receiver and further directed that "Herman S. Strauss, trustee, answer said petition" within two days after the filing of the same. The petition, sworn to, was filed on July 14th, and in it complainant alleged inter alia that the Weissmans "are in possession of the premises and are collecting the rentals therefrom;" that defaults have been made in payments due on the first or Strauss mortgage; that there "are numerous vacancies in the building;" that the premises are "worth not to exceed $120,000;" that the 1929 taxes thereon and certain special assessments have not been paid; and that the premises "are scant and meagre security" for the amount due to complainant.

On July 16th, within the required time, Strauss, as trustee, filed his verified answer, denying that complainant was entitled to have a receiver appointed and alleging inter alia that he is the trustee to whom the premises were conveyed by said first trust deed, which deed "secures a first mortgage bond issue of

complainant in [illegible]

inclusive (during time [illegible]

unpaid; and that the premises [illegible] a major apartment

building, containing about [illegible]

[illegible]

accurate [illegible]

German [illegible]

I. Gabbe, [illegible] bill, which

prayed for a [illegible]

appointment, [illegible]

On July 11, 1951 [illegible] of the

bill), after notice [illegible]

motion, the court granted [illegible] in support

of his motion for a receiver [illegible]

Stearns, counsel, appeared [illegible]

filing of the answer. The position, [illegible]

and in it complainant alleged [illegible]

possession of the premises [illegible]

[illegible]

motion; [illegible]

the premises [illegible]

[illegible]

complainant.

On July 16th, [illegible]

[illegible]

entitled to [illegible]

[illegible]

[illegible]

$130,000, on which there is unpaid and outstanding the principal sum of $116,471.85, with interest thereon at 7% per annum from March 13, 1931;" that, numerous defaults having occurred in the payment of certain of the bonds and coupons, he (Strauss, as trustee) "did on June 2, 1931, take actual possession of the premises * * and of the building thereon;" that since that date he has, through an agent, been managing and operating the building and collecting the rents for the benefit of the owners and holders of the bonds and coupons secured by said first trust deed; that he employed the Esbico Management Corporation as his agent for such purpose; that in turn said corporation employed "Herman Weissman as resident manager at a salary of $150 per month and Rose Weissman as housekeeper at a salary of $60 per month;" that the Weissmans are merely agents and employees of said corporation and are subject to be discharged at its will; and that likewise the employment of said corporation as agent for and on behalf of this respondent is subject to termination at his will. It does not appear that complainant filed any replication to Strauss' said answer.

On the same day (July 16th) the Foreman-State National Bank of Chicago appeared and, on its motion, the court granted leave to it to intervene and file a cross-bill instanter, which was filed. It alleged in part that it is the owner and holder of certain other notes secured by said second trust deed, viz., notes numbered 26 to 33, inclusive, aggregating $13,000, all of which are past due and unpaid, and that the premises are subject to said prior trust deed to Strauss, trustee. The prayer of the cross-bill is for the foreclosure of said second trust deed for cross-complainant's benefit and for the appointment of a receiver pendente lite. There are no allegations contained in the cross-bill which contradict the allegations in Strauss' answer to complainant's petition, as to Strauss

then being in actual possession, through sub-agents, of the premises as first mortgagee.

On the same day (July 16th), the cause came on for hearing on the question of the appointment of a receiver by virtue of complainant's bill and petition, to the latter of which by the direction of the court Strauss, as trustee of the first trust deed, had filed an answer. After arguments the court, over Strauss' objection, entered an order in which, after making certain findings, it was adjudged that Howard K. Murwith be appointed receiver of the premises and of the rents and profits thereof, "for the benefit of complainant," with the usual powers of receivers in chancery; that he, as receiver, "take all necessary legal proceedings for the protection of the premises, or to recover the possession thereof, or to remove all persons in possession who refuse to pay rent;" that complainant file a bond, as required by statute, in the sum of $200, to be approved by the court within five days; and that a receiver's bond, in the sum of $1,000, also be filed and approved within five days. The present transcript discloses that on the following day (July 17th) the receiver presented his bond, in said sum of $1,000 and the same was approved by the court and filed, and that shortly thereafter the court granted leave to him to employ a solicitor, etc. But the transcript does not disclose that complainant at any time presented to the court a complainant's bond for approval by the court.

On July 22nd, the receiver filed a petition in the cause alleging that the Weissmans are occupying an apartment in the building known as No. 112, on the premises; that it is necessary that the receiver have possession of the particular apartment "in order to properly operate the building;" and that demand has been made upon the Weissmans that they vacate the apartment and surrender possession,

[illegible] the total [illegible]
the first [illegible].

[illegible]
on the [illegible]
plaintiff's [illegible]
of the [illegible]
an answer. [illegible]
entered on [illegible]
adjudged [illegible]
and of the [illegible]
ant," with the usual [illegible]
xecutor, "who will [illegible]
of the [illegible]
all [illegible]
file [illegible]
approved [illegible]
in the [illegible]
The [illegible]
ition [illegible]
the same [illegible]
therefore [illegible]
etc. [illegible]
the [illegible]
the [illegible]

[illegible]
affecting the [illegible]
ing [illegible]
receiver [illegible]
properly [illegible]
the [illegible]

but that they have refused so to do. The prayer of the petition is that the court enter an order directing them to surrender possession to the receiver within a short day. There are no allegations showing in what capacity the Weissmans are occupying the apartment, whether as owners of the equity of redemption or (as alleged in Strauss' answer, above set forth, to complainant's petition for a receiver) as sub-agents for Strauss, trustee in the first trust deed. On the same day (July 22nd) the court, over Strauss' objection, entered a rule on the Weissmans that they answer the receiver's petition "within five days" (i.e., by July 27th) and further ordered that a hearing on the receiver's petition be set for July 28th.

On July 24th, said Foreman- tate National Bank filed a petition, verified by one of its vice-presidents, that it be allowed to amend its cross-bill by making one Adolph Fisher an additional party defendant, for the issuance of a summons to bring him into court, for a rule upon all the other cross-defendants to answer the cross-bill as amended within a short day, etc., and for the "extending of the receivership" of said Burwith "for the protection and benefit" of the bank. In the petition it is alleged inter alia that on the hearing of July 16th, which resulted in the appointment of the receiver on the motion of complainant, it for the first time appeared that said Fisher held the legal title of record to the premises, that Fisher acquired the same by quit claim deed of the Weissmans, "dated June 2, 1931, and recorded June 12, 1931;" that said conveyance "was made merely for the purpose of giving additional security for the indebtedness secured by said first mortgage trust deed;" that notwithstanding said conveyance the Weissmans are the equitable owners of the premises and are still in possession, collecting the rents and profits; that on said July 16th, at the instance of the

but that they have [illegible] to do. [illegible] the [illegible]
in the [illegible] [illegible]
possession to the receiver which [illegible]. There was no
allegations showing in the [illegible] that [illegible] or during
the apprentice, whether by [illegible] or [illegible] or [illegible] or
(as alleged in [illegible]) [illegible] [illegible] [illegible]
petition for a [illegible] [illegible] [illegible] [illegible] in the
first [illegible] [illegible]. [illegible] [illegible]
strange' conduction, [illegible] [illegible] [illegible]
the receiver's [illegible] [illegible] [illegible]
further [illegible] [illegible] [illegible]
for July 1874.

[illegible] July [illegible] [illegible] [illegible]
petition, verified by one of its [illegible] [illegible] [illegible]
to amend its [illegible] by [illegible] [illegible] [illegible]
party defendant, for the [illegible] of [illegible] [illegible]
court, for [illegible] upon all the [illegible] [illegible] [illegible]
crane-hill [illegible] [illegible] [illegible]
ing of the [illegible] [illegible] [illegible]
benefit" of the [illegible]. In the petition it is [illegible] that
on the [illegible] of July 1874, [illegible] [illegible] [illegible]
receiver on the motion of [illegible] [illegible] [illegible]
that such "[illegible] held the [illegible] [illegible] [illegible]
Either [illegible] [illegible] [illegible] [illegible]
June 2, 1874, [illegible] [illegible] [illegible]
made [illegible]. For the purpose of [illegible] [illegible] [illegible]
immediately [illegible] [illegible] [illegible]
withstanding a [illegible] [illegible]
of the [illegible] [illegible] [illegible]
and [illegible] [illegible] [illegible]

complainant (Cohn), the court appointed Hurwith as receiver and that he "took possession and control of the premises and is collecting the rents and profits;" and that petitioner is entitled to have the same relief as was awarded to complainant (i.e., a receiver) for the protection of its interest in the premises and in and to the rents and profits.

Without waiting until July 27th (when the answer of the Weissmans to said receiver's petition was due) the court on July 24th had a hearing on said cross-complainant's petition. This hearing resulted in the entry of an order by the court, over the objection of Strauss as trustee, "appointing" said Hurwith as receiver "for the protection and benefit of said Foreman-State National Bank and for the protection of its interests in and to said real estate and the rents and profits thereof," ordering that the bank be not required, for good cause shown, to file any bond as cross-complainant, and further ordering that summons issue as to said Fisher. In the order the court made numerous findings substantially in accord with the allegations of said amended cross-bill, but made no findings as regards the allegations in Strauss' verified answer to complainant's petition for a receiver, to the effect that he, as first mortgagee, was in the actual possession, through sub-agents, of the premises and building. The effect of the order, as we read it, was merely to extend the receivership of Hurwith, previously appointed as receiver and then acting as such, for the benefit of said cross-complainant, the bank. The order does not purport to vacate the previous appointment of Hurwith as receiver, made on July 16th, on complainant's motion. Indeed, the present transcript discloses that on July 28th the cause came on for hearing on the receiver's said petition of July 22nd, above mentioned, and that on the receiver's motion, by his solicitor previously appointed as aforesaid, the court ordered that the two Weissmans "vacate said apartment, No. 112, in said

complishment (Cooper, [illegible]) [illegible] that he "took [illegible] the trade [illegible] same belief [illegible] protection of its [illegible] and profits.

[illegible] statement to make [illegible] had a monitor on [illegible] remedied in the [illegible] of [illegible] the protection [illegible] for the particular [illegible] the works [illegible] for good [illegible] further [illegible] the court made [illegible] allegations of [illegible] regarding the [illegible] position for [illegible] was in the [illegible] building. [illegible] evidence the [illegible] and that [illegible] the bank. [illegible] ment of [illegible] motion. However, the [illegible] the court [illegible] July [illegible]

his solicitor [illegible] that the [illegible]

building, * * within five days from and after the date of the entry of this order."

The present transcript further discloses that, in accordance with the provisions of section 123 of the Practice Act and within apt time, Strauss, as trustee in said first mortgage, on August 13, 1931, presented his interlocutory appeal bond, dated August 13th, in the sum of $300, with surety, to the clerk of the superior court, and that that official approved the bond and on that day caused the same to be filed. The condition of the obligation is as follows:

"That whereas, the said Max M. Cohn did, on the 16th day of July, A. D. 1931, in the superior court of Cook county * * move for the appointment of a receiver, and the court did thereupon appoint Howard K. Hurwith as receiver of the premises and the rents, issues and profits thereof, from which order * * the said Herman S. Strauss, as trustee, has prayed for and obtained an appeal to the appellate court, within and for the first district in said State.

Now, therefore, if the said Herman S. Strauss, as trustee, shall duly prosecute his said appeal with effect, and moreover pay the amount of the costs, interest and damages rendered and to be rendered against (in favor of) Max M. Cohn and Foreman State Bank of Chicago, in case the said order shall be affirmed in said appellate court, then the above obligation to be void, otherwise to remain in full force and virtue."

But the present transcript further discloses that the same was not filed with the clerk of this court until September 22, 1931, (i.e., more than sixty days after the entry of said interlocutory order of July 16, 1931, appealed from.) In said section 123 of the Practice Act (Cahill's Stat. 1931, Chap. 110, p. 2189) it is provided in part:

"Whenever an interlocutory order or decree is entered in any suit pending in any court in this State, * * appointing a receiver, or giving other or further powers or property to a receiver already appointed, an appeal may be taken from such interlocutory order or decree to the Appellate Court of the district wherein is situated the court granting such interlocutory order or decree: Provided, that such appeal is taken within thirty days from the entry of such interlocutory order or decree, and is perfected in said Appellate Court within sixty days from the entry of such order or decree. The force and effect of such interlocutory order or decree and the proceedings in the court below shall not be stayed during the pendency of such appeal, and the party taking such appeal shall give bond, to be approved by the clerk of the court

building, [illegible] of the entry of this order."

The present [illegible] ance with the provisions of section 125 [illegible] within ugt time, [illegible] August 14, 1921, [illegible] August 12th, in a [illegible] superior court, and that [illegible] day cause to come to be filed. [illegible] is as follows:

"That whereas, the [illegible] day of July, [illegible] 1921, in [illegible] move for the appointment of [illegible] special Howard [illegible] issues and provide interest. [illegible] issues, as stated, [illegible] appellate court, [illegible] Now, therefore, [illegible] shall duly prosecute his [illegible] the amount of the costs, [illegible] rendered against [illegible] of Chicago, in [illegible] court, then the [illegible] full force and virtue."

"[illegible] was not filed [illegible] (i.e., more than [illegible] order of July 12, 1921, [illegible] Practice [illegible] in part:

"[illegible] any suit pending in the [illegible] receiver, or giving [illegible] cover [illegible] Incidentally [illegible] whereon is situated [illegible] deposit [illegible] from the entry of such [illegible] federal in [illegible] of such [illegible] order or decree and the [illegible] shall not be stayed during the pendency of such [illegible] appeal as in the case [illegible] court

below, to secure costs in the Appellate Court. Upon filing of the record in the Appellate Court the same shall there be at once docketed, and shall be ready for hearing under the rules of said court, taking precedence of other causes in said court. * * If such appeal is dismissed, the Appellate Court may allow to the attorney for appellee a reasonable solicitor's fee, not to exceed one hundred dollars, to be taxed as part of the costs of the appeal. No appeal shall lie or writ of error be prosecuted from the order entered by said Appellate Court on any such appeal."

Although we are of the opinion, in view of the apparently undisputed allegations of Strauss' verified answer to complainant's petition for a receiver that he (Strauss, as trustee) is the first mortgagee in possession by his sub-agents, that the superior court erred in entering the order of July 16th, 1931, appointing Murwith as receiver on the motion of complainant, the owner and holder of certain unpaid notes secured by the second mortgage (High on Receivers, 4th Ed., Sec. 679; 3 Jones on Mortgages, 8th Ed., Sec. 1937; Bolles v. Duff, 35 How. Prac. Rep. 481, 483; Springer v. Lehman, 50 Ill. App. 139, 143; Van Ness v. Arado, 257 Ill. App. 56, 59; Bogdonas v. Liberty Land & Investment Co., 309 Ill. 103, 110; Rohrer v. Heatherage, 336 Ill. 450, 454-5); still we are of the opinion that this court on the present appeal is without power or authority to reverse said order of July 16, 1931, appointing said receiver, for the reason that appellant (Strauss, as trustee) did not perfect his appeal in this court by the filing of a transcript of the record within sixty days from the entry of said order appointing said receiver, as provided in section 123 of the Practice Act. It is said in Harding v. Harding Incandescent Co., 98 Ill. App. 141, 142, that the right of appeal, by virtue of said section, "is a matter of statutory creation, not a common law right," and that, hence, "conformity to the statute is essential and a lack of it is jurisdictional." In Murray v. Hagmann, 318 Ill. 437, 440, it is said: "Section 123 of the Practice Act is the only statutory provision for appeals from interlocutory orders, and since the

below, or another costs in the appellate court, upon [illegible] or the record in the appellate [illegible] [illegible] and shall be [illegible] under the [illegible] said costs, [illegible] proceedings [illegible]. If much appeal to dismissed, the appellee [illegible] the property for appellee's reasonable [illegible]. But [illegible] exceed one hundred dollars, to be taxed [illegible] costs of the appeal. [illegible] from the order rendered by said [illegible] on said appeal.'

Although we are of the opinion, in view of the apparently undisputed allegations of [illegible]' verified [illegible] in complaint, that petition for a receiver in a [illegible], a mortgage in the first mortgagee in possession by its [illegible]. [illegible] mortgagor court erred in entering the order of July 12th, 1[illegible], appointing [illegible] as receiver on the motion of complainant, the [illegible] holder of certain unpaid notes secured by the second mortgage. [illegible] Receivers, 4th Ed., Sec. 279; [illegible] 1927; Bolles v. [illegible], [illegible] Lehman, [illegible]; [illegible] 86, 98; [illegible] v. Liberty [illegible] 110; Hobart v. [illegible]. [illegible] the opinion in this court on the [illegible] or authority to remove said order [illegible] said receiver, for the reason that [illegible] did not perfect the appeal in [illegible] of the record within ninety days from [illegible] ing said the [illegible] It is said in [illegible] 142, that the right of [illegible] matter of an injury [illegible] hence, "[illegible] to the estate is [illegible] interlocutory." In [illegible] said: "Section 1 of [illegible] provision for appeals from the [illegible] the time

right to an appeal is strictly statutory, * * no appeal from any interlocutory order or decree will lie unless taken in accordance with that section." In Alles Plumbing Co. v. Alles, 67 Ill. App. 252, 255, it is said: "The taking of an appeal under this act consists of a single act - filing a bond approved by the clerk; * * no prayer for an appeal is to be addressed to anybody, and nobody can fix any conditions for the appeal." In the instant case the appeal bond, contained in the transcript, discloses that the appeal was taken from the order of July 16, 1931, and that said appeal bond was approved by the clerk of the superior court, and filed, on August 13, 1931, - within the required thirty days. But it also appears that the appeal was not perfected in this court within the required sixty days. In McCarthy v. Chicago, 197 Ill. App. 564, one of the divisions of the appellate court for this district, in considering what is meant by the words, in said section 123, "and is perfected in said Appellate Court within sixty days from the entry of such order or decree," said (p. 573): "The only reasonable interpretation is, that there must be on file in the appellate court, within sixty days from the entry of the order or decree appealed from, a transcript of the record of the proceeding, from which this court can determine the correctness of the ruling of the court in issuing the interlocutory order complained of."

Our conclusion is that the appeal must be dismissed and such will be the order.

APPEAL DISMISSED.

Kerner and Scanlan, JJ., concur.

35620

CHICAGO TITLE & TRUST COMPANY,
a corporation, as trustee,
Complainant and Appellee,

v.

VIGGO N. C. KRAGH, SYDNEY J.
LUMLEY, HAROLD A. FEIN et al.,
Defendants.

On appeal of SYDNEY J. LUMLEY,
Appellant.

APPEAL FROM AN INTERLOCUTORY ORDER OF THE CIRCUIT COURT OF COOK COUNTY, APPOINTING A RECEIVER.

263 I.A. 647

MR. PRESIDING JUSTICE GRIFFIN DELIVERED THE OPINION OF THE COURT.

This is an appeal by Sydney J. Lumley, one of the defendants to complainant's bill to foreclose a first trust deed on certain improved premises in Chicago, from an interlocutory order of the circuit court, entered on September 4, 1931 (two days after the filing of the bill), appointing the Cook County Trust Co. as receiver of the premises, etc. The appointment was made, after notice to defendants, solely upon the allegations of the bill to which is attached the affidavit, in the usual form, of one Walter V. Fackler, an agent of complainant. No other documents or evidence were presented to the court. The defendant, Harold A. Fein, in his own behalf and in behalf of defendant, Sydney J. Lumley, objected to the appointment and asked leave to file a sworn answer of Lumley in opposition thereto, but the request was denied.

It is alleged in the bill that on January 1, 1927, the defendant, Kragh, a bachelor, and defendants, Niels J. Petersen and Nora, his wife, being indebted in the sum of $80,000, executed and delivered their 136 bonds for that aggregate sum, payable to bearer at the office of West Town State Bank, Chicago, and numbered con-

CHICAGO TITLE & TRUST COMPANY,
a corporation, as trustee,
Complainant and appellee,

v.

VIRGO M. [illegible], [illegible] G.
LOMBLEY, MARGIE [illegible], [illegible] et al.,
Defendants.

On appeal of [illegible] L. [illegible],
petition.

MR. [illegible] JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is an appeal by [illegible] L. [illegible], one of the defendants to complainant's bill to foreclose a trust deed on certain improved premises in Chicago, from an interlocutory order of the circuit court, entered on September [illegible], 1933, [illegible] the filing of the bill, appointing the [illegible] receiver of the premises, etc. The appellant was not [illegible] after notice to defendants, solely upon the allegations of the bill so which is [illegible] the affidavit, in the usual form, of one [illegible], [illegible] complainant. No other documents or evidence were [illegible] in the court. The defendant, [illegible], in his own behalf and in behalf of defendant, [illegible], [illegible], appeared in the chancery and asked leave to file a sworn answer of [illegible] to quantification thereto, but the request was denied.

It is alleged in the bill that [illegible] January [illegible], 1929, the defendant, [illegible], a [illegible], [illegible], [illegible] Nora, his wife, being indebted in the [illegible], [illegible] delivered their [illegible] [illegible] at the rate of [illegible] [illegible] [illegible]

secutively from 1 to 136, inclusive; that three of the bonds matured on January 1, 1928, and six on January 1, 1929; that others respectively matured on January 1, 1930, 1931 and 1932; that all bore interest at the rate of 6-1/2% per annum, payable semi-annually on the first days of July and January of each year, as evidenced by attached coupons; that all were delivered to complainant, as trustee, for certification, and were returned and thereafter negotiated and sold for a valuable consideration in the usual course of business; that those maturing on January 1, 1929, or prior thereto (being 9 in number), have been paid and cancelled; and that the other bonds, numbered 10 to 136, inclusive, are all unpaid and outstanding.

It is further alleged that to secure the bonds the defendants, Kragh and the two Petersens, on January 1, 1927, executed and delivered their trust deed (recorded January 4, 1927), whereby they conveyed and warranted to complainant, as trustee, the said premises (describing them), together with all buildings, etc. thereon, and "all rents, issues and profits which shall thereafter accrue from said premises" (copy of trust deed attached to the bill); and that said rents and profits were conveyed and assigned to complainant, in trust, for the equal protection, benefit and security pro rata of the holders of all bonds.

It is further alleged that bonds, Nos. 10 to 16, inclusive, for $500 each, with interest coupons, became due and payable on January 1, 1930, and that bonds Nos. 17 to 24, inclusive, for $500 each, with interest coupons, became due and payable on January 1, 1931; that no part of the principal of said fifteen bonds was paid; that no interest maturing on January 1, 1930, on any outstanding bonds, was paid; that these defaults have continued; that on August 19, 1931, the

[illegible] coupons
[illegible] January 1, [illegible]
[illegible] January 1, [illegible]
that all bore interest at the [illegible] rate [illegible]
semi-annually on the first days of [illegible]
as evidence by not [illegible] coupons that [illegible] to com-
plainant, as trustee, for certification, [illegible] and thereu-
after negotiated and sold for a valuable consideration in the usual
course of business. [illegible] 1919, or prior
thereto (being 9 in number), have been [illegible] in that
the other bonds, numbered 10 to 100, inclusive, are still unsold and
outstanding.

It is further alleged that [illegible] bonds [illegible] land-
ania, Krogh and the [illegible] corporation, on January [illegible], 1907, executed and
delivered their trust deed (recorded January [illegible], 1907), whereby they
conveyed and surrendered to complainant, as trustee, the [illegible] premises
(described therein), including [illegible] in Everson, and
"all rents, issues and profits which shall [illegible] from said
said premises" (subject [illegible] 1911); and that
said rents and profits were conveyed [illegible] to complainant,
in trust, for the equal protection, security [illegible] pro rata
of the holders of all bonds.

It is further alleged that [illegible], [illegible] inclusive,
for $50 each, with interest coupons, [illegible] on
January 1, 1907, and that [illegible] 12 to [illegible], inclusive, [illegible]
each, with interest coupons, [illegible] January 1, 1907
that a part of the principal [illegible] paid, [illegible] no
interest accruing on January [illegible], 1907, [illegible] on [illegible]
paid in [illegible] have continued [illegible] 1, 1911, the

holder of the fifteen bonds, and the holder of other bonds aggregating $12,000, in writing declared the principal of all bonds, then and now outstanding, to be due and payable immediately, and requested complainant to proceed to foreclose the trust deed; that pursuant thereto and by reason of said defaults, etc., the entire amount of the principal sum evidenced by said unpaid bonds, together with interest, costs, etc., are now due and payable, etc.; and that there is now due and owing to the legal holders and owners of said bonds, Nos. 10 to 136, inclusive, the sum of $75,500, with interest thereon due on January 1, 1930, and other interest.

It is further alleged that the West Town State Bank, as trustee, a defendant, obtained and now holds title of record of the premises in fee simple; that said Bank, as trustee, Sidney J. Lumley and Harold A. Fein (also defendants) "are the sole beneficiaries under said trust," and have or claim to have some interest in the premises; but that the same is inferior to the lien of said trust deed.

It is further alleged that it is expressly provided in the trust deed that upon the filing of any bill to foreclose the court "may, without notice to any person, appoint a receiver" for the benefit of the legal holder or holders, owner or owners, of the indebtedness secured thereby, with power to collect the rents thereof from during the pendency of said suit and during the statutory time of redemption from the decree entered in such suit, * * all without regard to the solvency or insolvency of the person or persons at the time of such application for said receiver liable for the debt secured thereby, and without regard to the value of the premises," etc.; that the trust deed conveyed and assigned the rents to complainant as additional security; and that, therefore, a receiver with usual powers should be appointed to take charge of the premises. And it is further alleged in the 15th paragraph of the bill

holder of the [illegible] bonds, [illegible] [illegible] [illegible] aggregating $14,000, in [illegible] deed of the principal or [illegible] bonds, then and now outstanding, to be due and payable immediately, and requested complainant to procure an foreclosure thereof; that prompt [illegible] and by reason of [illegible] default, the entire amount of the principal was [illegible] by [illegible] together with interest, costs, etc., [illegible] and that there is now due and owing on said legal matters and claims of said bonds, [illegible] in [illegible], including, the sum of [illegible], with interest thereon due on January 1, 1918, and other interest.

It is further alleged that [illegible] trustee, a defendant, obtained from [illegible] of the premises in [illegible] and [illegible] "[illegible] under such [illegible] premises; but that the [illegible] in the [illegible] the time of [illegible] the time [illegible] court "may, without notice to any person, [illegible] for the benefit of the legal [illegible] or [illegible], [illegible] of the indebtedness [illegible] time [illegible] of [illegible] from the [illegible] [illegible] regard to the solvency or insolvency [illegible] the time of such application [illegible] for the [illegible] secure the [illegible] and [illegible] [illegible] the premises," etc.; that the [illegible] [illegible] diminut on additional security [illegible] with [illegible] should be [illegible] to [illegible] the [illegible] and it is further alleged [illegible] [illegible]

"That said premises are improved with a three-story brick apartment building, * * consisting of 18 four-room apartments, plus one small apartment in the basement; * * that your orator is informed and believes, and so states the fact to be, that there are a number of vacancies in said building, and that the present gross income is $900 per month or $10,800 per year, that there is now due under the mortgage, including principal and interest, the sum of $32,000, that said building is about five years old and in need of repair and decorating, that the refrigerating system is in bad condition and in need of repair, that the 1929 taxes, in the amount of $1590,20, are unpaid and in default; that the fair, reasonable value of the premises under the present depressed condition of real estate is not in excess of, to-wit, $75,000, and it is inadequate security for the protection of the holders of said bonds, and that unless a receiver of such mortgaged property is appointed, the interest of your orator, and the bondholders that it represents, will be greatly injured, and the value of the security greatly depreciated, impaired and diminished. And your orator alleges upon information and belief that the signers of said bonds, and each of them, are unable to pay their obligations as they become due and have insufficient assets to pay their obligations and the bonds secured by the Trust deed herein sought to be foreclosed and that they are insolvent."

The prayer of the bill is for an accounting and a foreclosure and for the appointment of a receiver pendente lite.

We do not think that the bill contains sufficient positive allegations as warranted the immediate appointment of a receiver pendente lite. The essential allegations for such an appointment are contained in the 15th paragraph of the bill, as above set forth. It will be noticed that most of them are made upon information and belief and that others are conclusions. We do not think that the court, on such allegations not positively made, was warranted in immediately appointing a receiver, especially over the objection of two interested defendants and without regard to their request that one of them first be allowed to file a sworn answer. (High on Receivers, 4th Ed., sec. 639; Baker v. Adm'r of Backus, 32 Ill. 79, 115; Bagley v. Illinois Trust & Savings Bank, 199 Ill. 76, 79; Bagdonas v. Liberty Land & Investment Co., 309 Ill. 103, 110; Sherman Park State Bank v. Loop Office Building Corporation, 238 Ill. App. 450, 451; Davis v. Blair, 252 Ill. App. 417, 421-2; Strauss v. Georgian Building Corporation, 261 Ill. App. 284, 286.) In the Baker case

(p. 115) it is said: "A receiver is not usually appointed unless fraud is clearly proved by affidavit, or when it is shown that imminent danger would ensue, if the property is not taken under the care of the court, before an answer is put in. There must be a strong special ground to induce the court to interfere in this way before an answer." In the Bogdonas case (p. 110) it is said: "Application for the appointment of a receiver is addressed to the sound legal discretion of the court. It is a high and extraordinary remedy. The power is not arbitrary and should be exercised with caution and only where the court is satisfied there is imminent danger of loss if it is not exercised. The general rule is that the applicant must show * *, second, that the possession of the property by the defendant was obtained by fraud, or that the property itself, or the income arising from it, is in danger of loss from neglect, waste, misconduct or insolvency."

The order of September 4, 1931, appointing the Cook County Trust Co. as receiver, is reversed.

REVERSED.

Kerner and Scanlan, JJ., concur.

35061

MOIR HOTEL COMPANY,
a corporation, (plaintiff),
Appellant,

v.

GUSTAV MANN et al.,
(defendants),
Appellees.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

263 I.A. 647

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This action was commenced by the confession of a judgment on September 22, 1926, in favor of Moir Hotel Company, a corporation, plaintiff, against Fred Mann and Gustav Mann, defendants, for $5,983.33 for rent due August 15, 1926, under a lease of the premises known as the Boston Oyster House in the Morrison Hotel, Chicago. The defendants obtained leave to plead and filed the general issue with a notice of set-off, which claimed damages by reason of an alleged constructive eviction. Upon a trial by a jury, the defendants recovered a verdict and judgment in the sum of $28,000. To reverse this judgment plaintiff appealed.

The defendants' notice of set-off alleged that they had assigned the lease in question to Mann's Catering Company, a corporation, (hereinafter referred to as the Catering Company), which went into possession of the demised premises, made extensive additions and improvements, and attempted to conduct a restaurant business therein; that the plaintiff failed to furnish the quantity of ventilation specified in the lease; that the ventilation was not as represented by plaintiff prior to the execution of the lease, and that the ventilating system was not in accordance with the approved plans on file and approved by the City of Chicago; by

MOTA MOTOR CORP v.
a corporation, [illegible]
Defendant.

v.

GUECKAY ARTH et al.,
(defendants).
Appellees.

Mr. [illegible]

This action was [illegible] of a judgment on September [illegible], 1[illegible], in favor of [illegible] plaintiff, against [illegible] the [illegible], for $5,[illegible] for [illegible] known as the [illegible] defendants [illegible] a notice of [illegible] comparative negligence. [illegible] recovered a verdict on [illegible] this judgment plaintiff appeals.

The [illegible] and assigns the [illegible] corporation, [illegible] which went into [illegible] conditions [illegible] business [illegible] of [illegible] as [illegible] and in [illegible] approved plans [illegible]

reason of which the Catering Company was compelled to and did vacate the premises being thereby evicted, and sustained damages in the sum of $200,000, which damages it is alleged were assigned to the defendants.

The record discloses that the Boston Oyster House is located in the basement of the tower section of the Morrison Hotel in Chicago. It was first opened as a restaurant by the plaintiff about December 30, 1925, who operated it until June 5, 1926. It was opened as a restaurant by Mann's Catering Company on June 15, 1926, and closed September 10, 1926. Plaintiff reopened it on September 17 or 18, 1926, and thereafter up to the date of the trial it was operated by plaintiff. Early in 1926 negotiations were commenced through real estate brokers for a lease of this restaurant to the defendants. Fred Mann had been in the restaurant business for 40 years prior to entering into the lease. Gustav Mann had been in the restaurant business for 35 years and was in active charge of the restaurant in this case. The restaurant involved is in a basement and required artificial ventilation, and at the time the lease was entered into had no windows or openings except a door on its north side opening into a basement corridor running to the balcony of a restaurant in the same building conducted by plaintiff, under the name of Terrace Garden, and a door in the rear or east wall leading to other portions of the building. Before the execution of the lease the defendants were shown through the entire premises. Gustav Mann testified that he had been through the restaurant at least twenty times during the period that negotiations were in progress; that during his visits of inspection at the premises he noticed that the air in the restaurant was bad and called this to the attention of John W. Groves, secretary of plaintiff, and Mr. Heidenberg, its chief engineer; that he was

reason of which the Cabaret [illegible] to end its
remains being thereby [illegible] and machines [illegible]
in the sum of $[illegible], which [illegible] is in [illegible] to the defendants.

The [illegible] located in the basement of the [illegible] in Chicago. It was first opened [illegible] by the plaintiff about December 30, 1926, [illegible] was opened as a restaurant by [illegible] 1926, and closed December 1, 1926. [illegible] September 17 or 18, 1926, and [illegible] trial it was operated by [illegible] were conducted through real [illegible] restaurant to the defendants. [illegible] business for 40 years prior to [illegible] Harm had been in the restaurant business for 30 years [illegible] active charge of the restaurant in this case. [illegible] volved in a business and required artificial ventilation, [illegible] at the time the lease was entered into [illegible] except a door on the north side opening into [illegible] running to the balcony of a restaurant in [illegible] conducted by plaintiff, under the name of [illegible] in the rear or east wall leading to other [illegible] Before the execution of the lease [illegible] the entire premises. [illegible] through the restaurant [illegible] negotiations were in progress [illegible] at the premises he noticed [illegible] and called this to the attention of [illegible] plaintiff, and Mr. Heidenberg, [illegible]

shown the fan room and ventilating machinery which was outside of the premises in question but under the control of plaintiff, and representations were made to him by the engineer that the machinery was adequate when properly operated to furnish all necessary ventilation for the restaurant.

The premises were leased for use as a restaurant and the lease executed under seal May 12, 1926. The rent was not to begin until June 15, 1926, and by the terms of the lease the restaurant in the basement and two stores on the ground floor of the hotel facing Clark street (to be used in installing a new entrance) were demised to the defendants for a term of ten years. On or about May 22, 1926, the Catering Company, to which the lease had been assigned by the defendants with the consent of plaintiff, entered into possession to make additions and alterations to the premises before opening for business and began the making of improvements, furnishing and equipping the restaurant, expending more than $30,000 in permanent improvements. It installed a new entrance through the stores on the ground floor and removed a row of private dining rooms through the south portion of the demised premises.

At the time the lease was executed the air for the restaurant was obtained from a branch tunnel running between the Morrison Hotel and the First National Bank building. A few days before the Catering Company took possession plaintiff appealed to the City of Chicago for permission to take air for the ventilation of the restaurant from the Chicago Tunnel system, which was granted June 8, upon condition that the ventilating system be equipped with a full size intake for taking fresh air from at least ten feet above grade, and that whenever the supply from the tunnel failed to meet ordinance requirements the tunnel source should be discontinued.

The lease contained the following clause:

above the fan room on a small landing, a chimney and a [illegible] outside of the premises in question but under the control of plaintiff, and repairs[illegible] [illegible] the chimney that the machinery was defective [illegible] properly [illegible] to furnish all necessary ventilation for the [illegible] tenant.

The plaintiff [illegible] the lease [illegible] the lease [illegible] begin until June 1[illegible], 1[illegible], and [illegible] terms of the lease [illegible] restaurant in the [illegible] and two stories [illegible] the hotel facing [illegible] entrance) were [illegible] to the defendant for a term of two years. On or about May 22, 1[illegible], the defendant [illegible], to which the lease had been [illegible] with [illegible] of plaintiff, entered into possession to make additions [illegible] to the premises before opening for business and begin the making of improvements, furnishing and equipping the restaurant, expending more than $20,000 in permanent improvements. [illegible] entrance through the stairs on the prime floor [illegible] of private dining rooms through the south portion of the [illegible] premises.

[illegible] the time the lease was executed [illegible] for the restaurant was obtained from a vacant tunnel [illegible] the Morrison Hotel and the Tribune [illegible] building. [illegible] years before the Metering Company took possession [illegible] to the City of Chicago for permission to take air for the ventilation of the restaurant from the Tribune Tower [illegible] June 8, upon execution of a [illegible] a full size intake for taking fresh air from [illegible] grade, and that whenever the [illegible] overcheated recirculated the tunnel source would be [illegible].

The lease contains the following clause:

"The lessee has examined said premises prior to, and as a condition precedent to his acceptance and the execution hereof, and is satisfied with the physical condition thereof, and his taking possession thereof shall be conclusive evidence of his receipt thereof in good order and repair, except as otherwise specified hereon, and agrees and admits that no representation as to the condition or repair thereof has been made by lessor, or his agent, which is not herein expressed or endorsed hereon; and likewise agrees and admits that no agreement or promise to decorate, alter, repair or improve said premises, either before or after the execution hereof, not contained herein, has been made by lessor or his agent."

A rider was attached to the printed form of lease, paragraph 9 of which contains all of the provisions with regard to ventilation, which is as follows:

"That the lessor shall furnish ventilation to the demised premises through the ventilating system as at present installed, having a capacity of 17,000 cubic feet of air per minute in, and a capacity of 13,000 cubic feet of air per minute out, of the demised premises and adjacent lobby, and shall operate said ventilating system at the above indicated capacity, or at less number of feet of air per minute as the lessees may reasonably direct from time to time, and when necessary shall heat the air so forced through the ventilating system into the demised premises in the same manner and of not less than the same degree of temperature as furnished in the Terrace Garden and other sections of the Morrison Hotel. The ventilating shall also include the ventilation of the kitchen portion of the demised premises through the ventilating system as at present operated therein. All such ventilation and heating shall be without additional cost to the lessees. However, should the lessees desire to have the air coming into the demised premises cooled during certain seasons of the year to a lower degree of temperature than may be supplied through the ventilating system as at present operated, they shall have the right to install at their own expense in the ventilating room of the Morrison Hotel a refrigerating or cooling system and connect the same with the refrigerating system of the Morrison Hotel, said lessor agrees to operate the same with its employes and said lessees shall pay to the lessor for such refrigeration at the rate of four dollars ($4.00) per ton of 24 hours service for such hours as it may desire said service; the ton being figured as equivalent to 250 lineal feet of one and one-quarter (1¼) inch pipe. All such refrigeration equipment and connections thereto to be subject to the approval of the Chief Engineer of the Moir Hotel Company and of its architects, Messrs. Holabird & Roche, or of other architects selected by the lessor." (Italics ours.)

The restaurant had a seating capacity of 550 chairs. On the opening day about 500 guests congregated there during the lunch hour and about 1400 were served during the day. Gustav Mann testified that he noticed that the air in the restaurant was bad and excessively hot and complained to plaintiff's chief engineer who said that the condition was due to the counter draft created by a temporary canvas

[illegible]

"The lessee [illegible] premises through the ventilating system [illegible] having a capacity of 10,[illegible] cubic feet of air [illegible] a capacity of 15,[illegible] cubic feet of air [illegible] premises and delivered into [illegible], and [illegible] system at the above indicated [illegible] air per minute as the lessee may [illegible] time, and such [illegible] ventilating system into the [illegible] of not less than the [illegible] Fourteen Tenden and other [illegible] ventilating shall also include [illegible] of the demised premises through [illegible] separate ducts. [illegible] additional cost to the lessee. [illegible] to have the air coming into the [illegible] certain seasons of the [illegible] may be supplied [illegible] they shall have [illegible] ventilating room of the [illegible] system and connect the same with [illegible] portion thereof, and the lessor agrees [illegible] employee and only lessees [illegible] friendliness [illegible] service for such hours [illegible] figures [illegible] (12) [illegible] [illegible] motor [illegible] or of the [illegible]

[illegible]

the [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

over the staircase and would cease upon its removal and upon the completion of the new street front entrance and the installation of revolving doors; that after the canopy was removed the condition, however, remained the same, and that the matter was again called to the attention of the engineer. He then suggested the installation of moveable shutters in the door leading to the rear entrance. These were installed. The Catering Company on July 11, 1926, complained to plaintiff in writing that the premises were poorly and inadequately ventilated, and called plaintiff's attention to its previous complaints, to plaintiff's covenant in the lease to properly ventilate the restaurant, and its failure to do so, and demanded that plaintiff fulfill its agreement by providing adequate ventilation, and that unless it did so immediately it would vacate. July 17, 1926, a written complaint was made as to the ventilation in the kitchen, to which plaintiff replied that work had been begun on the new tunnel. July 28, 1926, a written complaint was made that the temperatures in the demised premises were in excess of 80 degrees. After the first complaint the plaintiff at its own expense installed a new intake from the Clark street tunnel at a point 95 feet from where the air for the ventilation of the Terrace Garden restaurant in the same hotel had been taken since 1919. This installation was completed about July 25, 1926. In granting permission to install this new intake the commissioner of health called attention to the high mositure condition of the tunnel air and plaintiff was advised that if it desired to maintain a dry temperature of 68 degrees to 72 degrees in the rooms excessive mositure conditions would prevail; that an increase in the wet condition of the tunnel and corresponding increase in the dry temperature of the tunnel might result in objection to the tunnel air for ventilating purposes. After the tunnel connection was made the air seemed a little cleaner but was as hot as before. In August, 1926, one of the ducts leading from

the supply fan in the sub-basement of the Boston Oyster House, which ran for a space of about 400 feet through the boiler room of the hotel was insulated, the plaintiff at its own expense enclosing it in a wire netting so as to create an air space three or four inches wide surrounding the duct proper and covering the outside of this frame work with asbestos. July 31, 1926, Irving Knight, an engineer for the health department of the City of Chicago, made a test of the air capacity and distribution in the demised premises. He testified that there was more than fifteen per cent less than the requirements shown on the plans in the health department, although he later stated the exhaust in the kitchens and dining room was sufficient. July 4, 1926, Gustav Mann, had a test of the ventilating system made under the direction of Charles E. Crone, Jr., a man of many years experience as a heating and ventilating engineer. His report showed a supply of 14,850 cubic feet of air per minute in the dining room, and an exhaust of 16,975 cubic feet per minute. J. A. Sutherland, who designed the ventilating system, testified that out of the supply of 17,000 cubic feet per minute, 3090 cubic feet would go to the adjacent lobby, and about 14,000 cubic feet to the Boston Oyster House; that 1830 cubic feet of the exhaust would come from the adjacent lobby and 1281 cubic feet from the Boston Oyster House. The result of the Crone test, plaintiff contends, disclosed that both the supply and exhaust of air in the demised premises exceeded the requirements of the lease. On August 6 and 7, 1926, Gustav Mann had another test made by Elmer Funck. His test showed 22 cubic feet over 50% of the required supply of air and 257 cubic feet less than 50% of the required exhaust, as specified in the lease.

Early in September, 1926, Gustav Mann informed Mr. Campbell, vice-president of plaintiff, that the smell and foul air remained the same; that there must be something radically wrong with the ventilating system; that they were not getting the ventilation specified in the

lease. This being disputed Gustav Mann suggested that both parties have ventilating experts at the premises and let them make a test together. Accordingly, a test was made September 8, 1926, at which a Mr. Armspach, from the office of E. Vernon Hill, an aerologist, represented the Catering Company, J. A. Sutherland, who designed the ventilating system represented Holabird & Roche, the architects, and Harry C. Rockfield represented Mehring and Hanson, the engineers who installed the system. September 10, 1926, Catering Company served notice on plaintiff that they were unable to continue business by reason of insufficient ventilation, and vacated the premises. Two or three days elapsed before the Catering Company completed the removal of its equipment. Plaintiff re-equipped the restaurant and had it open for business September 17 or 18, 1926.

The tests above referred to were taken with an anemometer, a delicately adjusted instrument which when placed against a current of air revolves rapidly and the volume of air is determined thereby.

There was evidence on behalf of defendants that during the occupancy by the Catering Company customers came in, became aware of the condition of the ventilating and left; that others began their meal but could not stand the conditions, complained of them, and left before finishing; that others became nauseated and left; that many complained of conditions and refused to return; that a medical society which had contracted for a monthly dinner for a year cancelled the contract after one dinner, giving as a ground therefor the defective ventilation. There was evidence on behalf of plaintiff that during the period the Catering Company was operating the restaurant the condition of the air was very good; no foul, stuffy, musty air, or any smell of sewer gas or dead rat smell.

The plaintiff contends that the court erred in the exclusion of evidence regarding the ventilation prior and subsequent to the occupancy by the Catering Company. The only important

question of fact in dispute was that of ventilation - the condition of the air - in the restaurant between June 15, 1926, and September 10, 1926. Many witnesses testified and there was considerable conflict. Upon this question witnesses were examined and the facts as to the condition of the air and the ventilation were fully detailed, and their testimony was of the most damaging character. The natural impression from it upon the minds of the jury would be that the ventilation was bad and the air foul. These witnesses testified that the air was sewery, smelly; it had a bad odor; it was dead air; foul smelling, hot, humid, ill-smelling, uncomfortable, stuffy, not wholesome; it had a peculiar odor as of dead rats; depressing, mildewy, smelly and damp.

It appeared from the evidence that there were no changes in the manner in which the ventilating system was operated between the time when the premises were first opened by the plaintiff as a restaurant, and the time the Catering Company took possession except that a portion of one of the ventilating ducts, which passed through the boiler room of the hotel, was insulated, the effect of which was to improve the ventilation. It further appeared that no changes were made in the ventilating system nor in the manner of its operation after the Catering Company vacated the premises. Testimony was heard on behalf of plaintiff tending to show that the ventilation of the restaurant was satisfactory prior to the time when the Catering Company took possession; and also after it vacated the premises. After this testimony had been admitted the court, on motion of defendants, struck from the record all testimony as to the conditions in the premises and as to the mechanical condition of the ventilating system and condition of the air and the method of operating the ventilating plant after September 10, 1926, and the court sustained defendants' objection to plaintiff's offer to prove that the condition of the air after the occupancy of the Catering Company was good and whole-

question of fact in dispute was that of ventilation - the condition of the air - in the restaurant between June 17, 1964, and September 10, 1964. Many witnesses testified on behalf of the defendants concerning the condition of the air in the restaurant during the period in question. Upon this question plaintiff's witnesses testified as to the condition of the air and the ventilation in the restaurant. The material impression from it upon the minds of the jury could be that the ventilation was bad and the air foul. [illegible] testified that the air was smoky, smelly, it had a [illegible] odor, was warm and foul smelling, had, inside, [illegible], [illegible], smelly, and unpleasant; it had a peculiar odor [illegible], stuffy, smelly, and damp.

[illegible] no changes in the manner in which the ventilating apparatus [illegible] between the time when the premises were first operated [illegible] as a restaurant, and the time when defendants [illegible] that a petition of one [illegible] the police room of the hotel, was [illegible] to improve the ventilation. [illegible] were made in the ventilating system [illegible] after the hearing commenced [illegible] on behalf of plaintiff [illegible] ventilation of the restaurant was satisfactory [illegible] Dampney took possession and did not alter [illegible] this testimony was [illegible] attack upon the [illegible] premises and to the mechanical [illegible] and condition of the air in the [illegible] plant after September 1, 1964, and [illegible] objection to plaintiff's offer to prove [illegible] air after the occupancy of the defendants [illegible]

some, suitable for restaurant purposes, and limited plaintiff's testimony to the period during the time the Catering Company operated the restaurant. The testimony stricken and that offered was calculated to elicit information on the important question in dispute, ventilation and the condition of the air in the restaurant, and would have been corroborative of the testimony that the restaurant was properly ventilated. In such a balance of conflicting testimony any corroborative testimony was important. In the trial court the defendants contended, and assert here, that evidence as to conditions subsequent to September 10 is inadmissible and cite cases holding that evidence as to conditions subsequent to the occurrence of an accident is properly excluded. After examining them we are of the opinion that they are not applicable. In our opinion the court erred in striking this testimony and in denying to plaintiff the right to prove the condition of the air after the occupancy of the Catering Company had ceased. The evidence under the circumstances in the instant case was admissible. (Cooper v. Randall, 59 Ill. 317; Kylie v. Elwood, 134 Ill. 281; Missouri Dist. Telegraph Co. v. Morris & Co., 243 Fed. 481; Pennsylvania Co. v. Boylan, 104 Ill. 595; Leitz v. Coal Valley Mining Co., 149 Ill. App. 85; Dixon v. City, 212 Ill. App. 365; The Arcade Co. v. Boxwell, 41 App. Cas. D. of C. 213.)

It is also contended that the court erred in the admission of testimony of Samuel C. Lewis. His testimony was based entirely on hypothetical questions and not on any examination or tests of the ventilating system. Defendants' counsel stated that his testimony was offered in rebuttal of the testimony of Harry C. Rockfield. Rockfield was the superintendent in charge of the installation of the ventilating system. He (Rockfield) testified to the making of a test of the ventilation on September 8, 1926; that his company made changes in the ventilating system during alterations made by

made changes in the world in the opposite direction by

the Catering Company; that the ventilating system in the kitchen was installed under his supervision, and that the exhaust from the kitchen went to the main exhaust riser, which also connects with the kitchen for the Terrace Garden and the hotel kitchen; that there was no damper in the system which could shut off the exhaust from the Boston Oyster House kitchen before it went into the main exhaust riser. On cross-examination he testified that the exhaust from the Boston Oyster House kitchen did not go through at an angle but went into an upright stack from the ranges; that it entered the main vertical upright stack in the same manner as the exhaust from the hotel kitchen; that there are slides in the canopy above the ranges in the hotel kitchen which can be adjusted to control the volume of air, giving a higher volume of air at one point than at another; but that if the slides of the hotel kitchen were all opened so that the exhaust was pouring through all of them it would have no effect upon the Boston Oyster House kitchen. Samuel R. Lewis was asked if a kitchen exhaust duct enters a main riser below a "comparatively small branch," without any regulating damper, and there is an "ample supply of air in the lower kitchen to satisfy the suction or vacuum created in the main line, have you an opinion as to what would happen to the suction on the smaller branch," and was permitted to give his opinion over objections of plaintiff's counsel.

After carefully examining all the testimony in the record we are of the opinion that the court erred in overruling the objection of plaintiff's counsel. There was no evidence that the exhaust from the Boston Oyster House was a "comparatively small branch" or that the supply of air in the Terrace Garden kitchen was "ample to satisfy the suction or vacuum created in the main line." It was rebuttal testimony and the question above noted, and others that followed, were not warranted by the evidence.

[illegible]

[illegible] the Quarter, [illegible] a [illegible]
was installed and [illegible]. [illegible]
kitchen [illegible] to the main [illegible] [illegible]
the kitchen for the [illegible]
there was no change in the [illegible]
from the Senior Lyster [illegible] a [illegible]
examined via [illegible]
from the [illegible]
but were [illegible] [illegible]
main vertical [illegible]
the hotel block of [illegible] [illegible]
changes in [illegible] [illegible] of the
volume of [illegible]
machinery but [illegible]
so that [illegible]
effect upon the [illegible] Water [illegible]
added if a kitchen [illegible] [illegible]
"comparatively" small [illegible]
there is an "[illegible]" of air in the [illegible]
the suction or vacuum [illegible]
as to what [illegible] [illegible]
and permitted to give his opinion [illegible]
counsel.

[illegible]
record [illegible] of the opinion [illegible]
the objection of plaintiff's counsel. [illegible]
the evidence [illegible] the Boston [illegible]
branch" or [illegible]
"ample to satisfy the [illegible] the main [illegible]
it was [illegible]
that follows. [illegible]

Many other points are raised by plaintiff as to why the judgment should be reversed, but in the view we take of the instant case it will not be necessary to discuss all of them. The principal remaining contention of the plaintiff is that the court erred in instructing the jury. The instructions complained of directed a verdict for the defendants, if the jury found certain facts. Where an instruction directs a verdict for either party, or amounts to such direction in case the jury find certain facts, it must necessarily contain all the facts which will authorize the verdict directed. (Pardridge v. Butler, 168 Ill. 504.) By an instruction tendered by the defendants the jury were told if they found that plaintiff failed to furnish proper ventilation to the premises in question, and that by reason of such failure the Catering Company was prevented from properly carrying on its business and the premises were thereby made unfit for the purpose of a restaurant so that the Catering Company had to abandon them and thereby sustain damages, their verdict should be for the defendants. And by another instruction that if the supply of fresh air furnished to the premises by plaintiff was of such insufficient quantity and the ventilation therein so poor that the customers of the Catering Company refused to and did not patronize the restaurant, and as a direct consequence and result thereof the Catering Company was prevented from properly conducting its restaurant business there and the premises thereby made unfit for the use and purpose of a public restaurant, so that the Catering Company was compelled to and did abandon the possession and use of the same, and thereby sustained damages, their verdict should be for the defendants. In our opinion, the contention of the plaintiff as to these instructions is well taken as they ignore the express covenants of the lease in regard to the ventilation. The question of what was proper ventilation was nowhere defined in the instructions and the

instructions ignored the fact that the conditions complained of must have continued until the premises were vacated, and also ignored the changes in the premises and changes in the ventilating system made by the Catering Company.

Defendants have filed cross-error claiming they should have been allowed interest at the rate provided by law from February 14, 1929, the date of the verdict, to the date of the rendition of the judgment, but in the view we have taken of the instant case, it is not necessary that we discuss the error assigned.

For the reasons indicated the judgment of the Circuit court will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Gridley, C. J., and Scanlan, J., concur.

35084

OLIVE LUDVIGSEN, administratrix of the estate of EDWIN LUDVIGSEN, deceased, (plaintiff),
Defendant in Error,

v.

RICHARD A. OLSEN, (defendant),
Plaintiff in Error.

ERROR TO SUPERIOR COURT, COOK COUNTY.

263 I.A. 647

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This was an action on the case brought under the statute by Olive Ludvigsen, as administratrix of the estate of Edwin Ludvigsen, deceased, for the benefit of the next of kin, against Richard A. Olsen and Dennis Daley for wrongfully causing the death of Edwin Ludvigsen. During the trial, on motion of plaintiff, the suit was dismissed as to Dennis Daley. The cause was tried before a jury and plaintiff recovered a judgment for $3000. The defendant, Richard A. Olsen, sued out a writ of error to reverse the judgment. The plaintiff has not appeared or filed a brief in this court.

The declaration originally consisted of four counts. At the conclusion of plaintiff's case, she dismissed the second and third counts. The first count alleged that on December 9, 1928, while Edwin Ludvigsen was riding as a passenger in the car of Dennis Daley at the intersection of North Harlem and Belmont avenues, Chicago, and defendant was driving his car at said intersection, said defendant and Dennis Daley so carelessly and improperly drove their respective cars that they collided with each other, injuring plaintiff's intestate, from which he died. The fourth count charged that while plaintiff's intestate was riding as a passenger in a motor vehicle operated by Daley northerly upon North Harlem avenue up to and on the intersection

38084

OLIVE LUDVIGSEN, administratrix of the estate of KEVIN LU VIGSEN, deceased, (plaintiff), defendant in error,	
v.	
RICHARD A. OLSEN, (defendant), plaintiff in error.	

Mr. JUSTICE [illegible] delivered the opinion of the court:

This was an action on the case brought by the administratrix of the estate of Kevin Ludvigsen, deceased, for the benefit of the next of kin, against Richard A. Olsen and Donnie Daley for wrongfully causing the death of Kevin Ludvigsen. During the trial, on motion of the defendants, the suit was dismissed as to Donnie Daley. The cause was tried before a jury and plaintiff recovered a judgment for $[illegible]. The defendant, Richard A. Olsen, sued out a writ of error to review the judgment. The plaintiff has not appeared or filed a brief in this court.

The decision of this [illegible] conflicts with other courts. [illegible] the conclusion of plaintiff's case, the circuit court allowed the motion of the third counts. The first count alleged that on [illegible], 1964, while Kevin Ludvigsen was riding as a passenger in the car of Donnie Daley at the intersection of North Avenue and Austin Avenue, Chicago, and defendant was driving his car at said intersection, said defendant and Donnie Daley so carelessly and negligently drove their respective cars that they collided with each other, injuring plaintiff's intestate, from which he died. The fourth count charged that plaintiff's intestate was riding as a passenger in a motor vehicle operated by Daley northerly upon North Avenue up to and on the intersection

of Belmont avenue, and the defendant Olsen was operating another motor vehicle in a westerly direction upon Belmont avenue, up to and on the intersection of Harlem avenue, Daley negligently, recklessly, wilfully and wantonly drove said motor vehicle up to and on said intersection at the rate of 50 miles an hour, when Olsen's motor vehicle was close to and on said intersection, and further charged that Olsen negligently, recklessly, wilfully and wantonly drove his motor vehicle up to and on said intersection at a rate of speed of 50 miles an hour, and as a direct and proximate result of the wilfull and wanton conduct of the defendants, the motor vehicles collided with each other on said intersection, resulting in the death of plaintiff's intestate. The defendant pleaded the general issue.

The record discloses that shortly after midnight of December 9, 1928, a Willys-Knight automobile driven by Dennis Daley collided with a Cadillac automobile driven by the defendant, at the intersection of North Harlem avenue; the territory surrounding this intersection has no buildings except a small shack at the northeast corner, that had been used for a real estate office. Both highways were paved; neither was marked as through streets or as state highways, and neither had "stop" or "slow" signs or signals. The collision occurred in the north half of the intersection and in the west half. Just prior to the collision defendant was coming from the east driving west on Belmont avenue; Daley was coming from the south driving north on Harlem avenue. Daley's automobile was to the left of defendant's automobile, whose automobile was to the right of Daley's automobile, as they respectively approached the intersection. With Daley in his automobile was Edwin Ludvigsen, plaintiff's intestate, whom Daley was taking to his home. As a result of the collision Edwin Ludvigsen received injuries from which he died, leaving him surviving a widow and two minor children. Ludvigsen was 36 years

of Johns. [illegible] in [illegible]
motor vehicle [illegible] I [illegible]
and on the investigation of Dublin [illegible]
[illegible] legally [illegible]
said [illegible]
motor vehicle [illegible]
charged that [illegible]
drove his motor vehicle [illegible] rate of
speed of [illegible] miles an hour, [illegible] of
the willful and wanton conduct of [illegible] under violations
contained [illegible] in the [illegible]
of plaintiff's intestate. [illegible]

[illegible]
[illegible] 1, 1928, a [illegible]
collision [illegible] driven by [illegible]
intersection of [illegible]
intersecting [illegible]
corners, [illegible]
were parked [illegible]
way, [illegible]
collision occurred in the [illegible] of the [illegible]
west half. [illegible] in the collision [illegible]
the east driving [illegible]
motor vehicle north on [illegible]
left of [illegible] vehicle, [illegible]
Dolan's automobile, [illegible]
[illegible]
intestate. [illegible]
collision [illegible]
[illegible] a [illegible]

old at the time of his death and was by occupation a bricklayer and earned $13.40 a day.

Dennis Daley was the only witness in behalf of the plaintiff as to the happening of the collision; he testified that on December 9, 1928, he met Ludvigsen at Crawford and Grand avenues and invited him into his Willys-Knight automobile, stating that he would drive him to his home; that as he drove north on Harlem avenue, he had his headlights burning; also a ditch light, which threw a light, picking up the edge of the road. It was about midnight as he approached Belmont avenue on the east side of Harlem avenue at 20 miles an hour; Ludvigsen was talking and the witness testified he thought Ludvigsen was looking ahead, glancing from side to side; when 50 feet south of Belmont avenue he slowed down but did not stop; took his foot off the accelerator and looked to the right and saw automobile lights 300 feet to the east; looked to the west, nothing coming, he thought everything was clear and proceeded ahead; looked again, got a glare of light and saw the lights were right ahead of him; his automobile was struck while north of the center line of Belmont avenue and he woke up in a hospital.

The other witnesses called in behalf of plaintiff were Olive Ludvigsen, widow of the deceased, who testified as to her relationship to the deceased and whomhe left surviving him. Edward A. Stretch and Frank Lemke testified they were at Harlem and Berry avenues, one block south of Belmont; did not see the accident but heard the crash; ran to the scene and saw Daley's automobile was 14 feet west of Harlem avenue, facing southeast; the right front fender and rear right wheel damaged; defendant's automobile was 6 or 7 feet north of Daley's automobile, facing south.

Alex Lazar testified that he was driving his automobile on Natoma avenue (which is about one mile east of Harlem avenue) approaching Belmont avenue and saw a Cadillac automobile going

[illegible] and [illegible] [illegible] a day.

[illegible]

[illegible]

west at about 50 to 55 miles an hour; he turned into Belmont avenue and proceeded west; a minute or a minute and a half later he heard a crash; drove on to Harlem and Belmont avenues and there saw a Willys-Knight and a Cadillac automobile.

Lawrence Ludvigsen testified he visited the scene of the collision about 10 a. m. December 9, and saw Daley's automobile at the northwest corner of Harlem and Belmont avenues; right side smashed, rear wheel broken. Douglas Middleton testified he took the photographs offered in evidence.

The testimony for defendant showed that defendant and his wife were driving westerly on Belmont avenue. A Buick automobile driven by Charles Miller closely followed his automobile all the way from Irving Park and Tripp avenues. The Miller automobile was followed by other automobiles.

Wayne Breisch was in the Miller automobile. He testified that there were other automobiles ahead of the Olsen automobile on Belmont avenue and that all were proceeding westerly. The Olsen automobile was 25 to 30 feet from the automobile in which Breisch was riding. He saw Olsen enter the intersection of Harlem and Belmont avenues, and when the Olsen automobile was a little west past the center of Harlem avenue, an automobile came from the south and crashed into Olsen's automobile and both automobiles slid and came to rest at the edge of the road. The automobile from the south hit Olsen's automobile on the left, and the back wheels of Olsen's automobile were just about at the center line of Harlem avenue when it was hit. He also testified that Olsen slowed down for the intersection of Harlem avenue and that Olsen was going about 15 or 20 miles an hour as he entered the intersection. Prior to that time the speed had been about 35 miles an hour. The lights were on the Buick automobile in which Miller was riding and with them could be seen Olsen's automobile and an area on both sides of Olsen's automobile. Olsen's lights were on

[illegible] at about 15 to 20 miles an hour; [illegible] Belmont avenue and proceeded west; a minute or a minute and a half later he heard a crash; drove on to Halsted and Belmont avenues and [illegible] Utility-Match and a Traffic automobile.

Witness Dwiglyne testified he visited the scene of the collision about 10 a.m. [illegible] at the northwest corner of Halsted and Belmont avenues, [illegible] smashed, two wheel broken. Dwiglyne indicated [illegible] the photographs offered in evidence.

The testimony for defendants [illegible] with were driving westerly on Belmont avenue. [illegible] driven by Harlie Hilts (finally indicated [illegible] from Irving Park and Clybourn avenues. The latter [illegible] by other automobiles.

Ayre Frelsen was in the Hilts automobile. He testified that there were other automobiles where [illegible] Belmont avenue and that all were going in westerly. The Lean automobile was 20 to 30 feet from the automobile in which Frelsen was riding. He saw Lean enter the intersection of Halsted and Belmont avenues, and when the Lean automobile [illegible] the center of Irving Avenue, an automobile came from the north and [illegible] into Lean's automobile and both cars [illegible] to rest at the edge of the road. The automobile from the south [illegible] automobile on the left, [illegible] automobile were just ahead [illegible] Lean [illegible] also testified that [illegible] for [illegible] Irving avenue and [illegible] or [illegible] he entered the intersection. [illegible] 18 miles an hour. The [illegible] Hilts automobile in which Miller was riding and [illegible] Lean could be seen Hilts' automobile and [illegible] on both sides of Hilts' automobile. Hilts's 11 mile [illegible]

and they were bright lights.

In the automobile with Miller and the witness Breisch was June Harding. She corroborated the testimony of Breisch with reference to following Olsen's automobile and to the effect that the lights on both sides were on. She did not actually see the crash but heard it. Before reaching Harlem avenue, in her opinion, the speed of the automobile was about 25 to 30 miles an hour. She also testified there were other automobiles in the line back of the automobile in which she was riding.

The witness Raymond Anderson was in one of the automobiles farther back in this line, and he testified that there were five or six automobiles ahead of the automobile in which he was riding, including Olsen's automobile. He did not actually see the accident but his testimony was clear as to the number of automobiles that were traveling in line on Belmont avenue. Charles Miller was the driver of the automobile which followed Olsen's automobile. With him in the automobile were Breisch, June Harding and Lavergne Hassman. He testified that he followed Olsen's automobile west on Belmont avenue; that he was about 50 feet behind Olsen and that Olsen slowed down as he went into Harlem avenue. He saw the Willys-Knight automobile come from the south and hit defendant's Cadillac toward the front. Then the Willys-Knight swung to its own right side and its rear end hit the rear end of Olsen's automobile, so that the front end of the Willys-Knight hit the Cadillac and then the back ends of both automobiles hit each other. The first time that Olsen's automobile was hit it was on the front left side. He further testified that he did not see any lights on the Willys-Knight; that as they approached Harlem avenue they were going about 25 miles an hour and that when defendant slowed down his speed was reduced to about 10 miles an hour. The front end of defendant's automobile was past the center line of Harlem avenue when he was hit. It was the front part of defendant's automobile

[illegible] were [illegible] lights.

In [illegible] accordingly [illegible] Jackson was Jane Darling. He [illegible] a theory, [illegible] reference to [illegible] the lights on both sides [illegible] crash but denied it. Before [illegible] in his opinion, the speed of the automobile was [illegible] to be safe [illegible]. He also testified [illegible] automobile in [illegible] of the automobile in which she was riding.

The witness [illegible] further such [illegible] of the automobile [illegible] air automobile [illegible] or [illegible], in [illegible] but his testimony was [illegible] of automobile [illegible] traveling in line on "[illegible]". [illegible] driver of the automobile which [illegible] automobile. [illegible] in the automobile was [illegible], Jane [illegible]. He testified that [illegible] that he was about [illegible] he went into [illegible] from the [illegible] the lights-bright [illegible] the [illegible] automobile, [illegible] Twilight but the [illegible] his [illegible] on the front left side. [illegible] lights on the [illegible] they were [illegible] down his [illegible] of defendant's [illegible] when he was hit. [illegible] the front part of [illegible] the

that was hit and it was past the center line of the street. Defendant's automobile was on the right side of Belmont avenue immediately before the collision.

The fourth passenger in the Miller automobile was Lavergne Hassman, who was in the automobile but had her head back on the cushion immediately prior to the crash. She corroborated the other witnesses as to the speed of the automobile.

The defendant has assigned and argued four grounds why the judgment should be reversed. The only question necessary to be now considered presented by this record, is, did the court err in instructing the jury.

The court gave the jury the following instruction:

"The court instructs the jury that though it is provided by statute in this state that motor vehicles traveling upon public highways shall give the right of way to vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left, still this statute does not apply unless such vehicles are approaching the point of intersection of such highways at, or nearly at, the same time; and if you believe from the evidence in this case, under the instruction of the court, that the vehicle in which the plaintiff's intestate was riding before and at the time of the occurring of the accident in question in this case, was proceeding in a northerly direction in North Harlem avenue near and at its intersection with Belmont avenue, and that the vehicle which the defendant was then driving was proceeding in said Belmont avenue in a westerly direction toward the said North Harlem avenue, and that when the said vehicle in which the plaintiff's intestate was riding was at the south side of the intersection of the said North Harlem avenue and the said Belmont avenue, the said vehicle then driven by the defendant was two hundred feet or more east of the east side of the said intersection, then the question which of the said vehicles should give way to the other in crossing the said intersection is one of fact for the jury to be by you determined which of the said vehicles should give way to the other, and which had the right of way over the said intersection, as against the other."

It is very apparent from a consideration of the evidence that it was essential that the jury be accurately instructed on the relative rights of Olsen and Daley as they approached the intersection of Harlem and Belmont avenues. The instruction, as given, is unquestionably bad and should have been refused as it was. The jury by this instruction were given to understand that the statute which

that was his [illegible] at the [illegible] street, defendant's automobile was on the right [illegible] some [illegible] before the collision.

The fourth passenger in the [illegible] automobile, a [illegible] Hausman, who was in the automobile but [illegible] head [illegible] immediately prior to the crash. [illegible] as to the speed of the automobile.

The defendant has [illegible] the jury, [illegible] the judgment should be reversed. [illegible] be now considered [illegible] in instructing the jury.

The court gave the jury the following instructions:

"The court instructs the jury [illegible] it is provided by statute in this state that [illegible] highways shall give the right of way to vehicles approaching from the intersecting highway from the right, and shall have the right of way over those approaching from the left, and that such statute does not apply unless such vehicles are approaching the point of intersection of such highways at a reasonably [illegible] believe from the evidence in this case, under the instruction of the court, that the vehicle in which the plaintiff's [illegible] before the time of the collision [illegible] in question in this case, [illegible] in North Hudson avenue [illegible] the intersection [illegible] and that the vehicle which the [illegible] in said Belmont avenue in a [illegible] in which the said North Hudson avenue, and that when the said vehicle in which the plaintiff's intestate [illegible] the north side of the intersection of the said North Hudson avenue and the said Belmont avenue, the said vehicle [illegible] or one east of the east side of the said intersection, then [illegible] the said intersection in the [illegible] which of the said vehicles [illegible] the other, and which had the right of way [illegible] the other."

[illegible]

[illegible] on the [illegible] of Harlem and Belmont avenues [illegible] the intersection [illegible] quantitatively bad and [illegible] the jury [illegible] by this instruction [illegible] the [illegible] which

gives a motor vehicle approaching from the right the right of way over a motor vehicle approaching an intersection from the left did not apply unless such vehicles are approaching the point of intersection of said highways at or nearly the same time. It has repeatedly been held that the relative distances of the vehicles from the intersection and their relative rates of speed are factors that must be taken into consideration. (Heidler v. Wilson & Bennett Co., 243 Ill. App. 89; Schwartz v. Lindquist, 251 Ill. App. 320.) It was error to give this instruction, as the statute does not authorize such assertion of the right of way regardless of circumstances and speed. (Riddle v. Manaager, 254 Ill. App. 68, 72.)

For the error indicated the judgment of the Superior court will be reversed and the cause remanded for a new trial and it is so ordered.

REVERSED AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

given a motor vehicle [illegible] over a motor vehicle [illegible] not apply [illegible] section [illegible] requests [illegible] from the intersection [illegible] that must be taken into consideration. [illegible] Co., 143 Ill. App. 553 [illegible] It was error to [illegible] authorize [illegible] recovery and [illegible]

For the errors [illegible] will be reversed and [illegible] ordered.

[illegible]

Gridley, [illegible], and Watson, J., concur.

35116

In Re: Estate of KACHADOOR MANOOGIAN, Deceased.

ZAKAR MARKARIAN,
Appellant,

vs.

AVEDIS BOGOSIAN, Administrator of the Estate of KACHADOOR MANOOGIAN, Deceased,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit court entered February 7, 1931, after a trial de novo without a jury, had on appeal from a judgment of the Probate court, wherein the Circuit court disallowed and denied the claim of Zakar Markarian against the estate of Kachadoor Manoogian, deceased.

Kachadoor Manoogian died on June 16, 1927; on January 17, 1928, appellant filed his claim in the Probate court of Cook county and alleged it was based upon a note executed by the deceased for $2,000 dated March 1, 1925, payable three years after date, to the order of appellant, with interest at four per cent per annum.

On the trial on January 16, 1931, before any evidence was offered by the appellant, the appellee claimed the note was a forgery. The appellant introduced the note and rested. The appellee then proved the deceased died on June 16, 1927, and offered to prove the note was a forgery, to which appellant's attorney objected on the ground that the appellee had not filed a plea, supported by affidavit denying the execution of the note as provided by Ch. 110, Sec. 52, Cahill's Revised Statutes 1931, page 2178; the appellee thereupon moved he be granted leave to file an affidavit denying the execution of the note, which the court granted and continued the cause to February 6, 1931. When the trial of

[illegible]

In Re: Estate of RACHAMOW [illegible],
Deceased.

[illegible],
Appellant,

vs.

AVERIO DOUGLAS, administrator [illegible]
Estate of RACHAMOW [illegible], deceased,
Appellee.

[illegible]. JUSTICE BRAYER [illegible] opinion of the Court.

This is an appeal [illegible] entered February 7, 1958, after a trial [illegible] on appeal from a judgment of the probate court, [illegible] court dismiss and denied the [illegible] estate of Rachamow [illegible], deceased.

Rachamow [illegible] died [illegible] 17, 1956, [illegible] county and alleges it was [illegible] caused for [illegible] date, to the order of [illegible] per annum.

On the trial [illegible] was offered by the appellant, [illegible] forgery. The appellant [illegible] believe that proved the [illegible] to prove the note was a forgery, [illegible] tested on the ground that the [illegible] port by affidavit denying [illegible] by Ch. 110, Sec. 5, Smith's [illegible] the appellee thereupon [illegible] death denying the execution [illegible] and continued the case to [illegible] 5, 1957. When the trial of

the cause was resumed on February 6, 1931, the appellant called as his witness Babajan E. Minasian, who testified that in March, 1925, the deceased said he had received some money from Zakar Markarian and gave the witness the note for $2,000 and told him to give it to the appellant.

Frank H. Novak, a witness on behalf of the appellee, testified that he was a member of the Illinois Bar and knew the appellant; that the latter part of August or early in September, 1927, appellant came to his office and requested the witness to make a note for $2,000, which he did; that the note received in evidence is the identical note which he drew in August or September of 1927; that all of the note was in his handwriting except the signature; that he received the information relative to the date and the amount of the note from appellant; that at the time he drew the note he was not aware that Kachadoor Kanoogian had died in June of 1927. On cross-examination he was asked to write the written words upon the note involved in the instant case, without the note being shown to him. He did so. At the conclusion of the cause the trial court said, "Let the record show that the court has examined the handwriting on this note and compared it with the handwriting of Mr. Novak, made on the stand; they are in the same handwriting."

William H. Bock testified he had been engaged in the real estate business for fifteen years and knew the deceased during his lifetime and saw him sign a trust deed and twenty notes, which were then offered and the court received in evidence this trust deed and twenty notes bearing the genuine signatures of the deceased, dated September 1, 1921, and they were marked Estate Exhibits 1 to 21 inclusive.

E. H. Rumbold testified he was engaged in the real estate

the cause was renewed on 26 January 1, 1971, the [illegible] not unlike his witness Fabian R. Anderson, who testified that in [illegible], 1969, the deceased said he had received [illegible] money from [illegible] and gave the witness the note for safe [illegible] in the appellant.

Frank R. Moyer, a witness on behalf of the appellant, testified that he was a member of the [illegible] the appellant; that the jacket [illegible] or worn in [illegible], 1967, appeal or came to his office and requested the [illegible] to make a note for $2,000, which he did; that the note received in evidence is the identical note which he drew in accordance [illegible] of 1967; that all of the note was in his handwriting except the signature; that he received the letter which [illegible] and the amount of the note from appellant; that [illegible] he drew the note he was not [illegible] June of 1967. On cross-examination he was [illegible] written words upon the note [illegible] the note being shown to him. He did not. [illegible] cause the trial court said, "[illegible] examined the handwriting on this note and compare it with the handwriting of Mr. Moyer, which is [illegible]; [illegible] handwriting."

William R. [illegible] real estate business for fifteen years and [illegible] his letters and saw him sign a [illegible] were then offered and the [illegible] and twenty notes bearing the genuine signature of the [illegible] dated September 1, 1967, and [illegible] 21 inclusive.

R. R. Lindsay testified [illegible] in the last estate

loan and insurance business and knew Kachadoor Manoogian during his lifetime and saw him sign two notes for $225 each, dated August 28, 1926.

Rudolph B. Salmon testified that he was an expert examiner of questioned documents since 1915 and in that period had examined in excess of one thousand disputed documents; that he had examined the trust deed and notes above mentioned as well as the note for $2,000, and that it was his opinion that the person who signed the trust deed and notes was not the same person who signed the name of "Kachadur Manoogian" on the $2,000 note dated March 1, 1925, and stated his reasons therefor.

In rebuttal the appellant testified that he was not at Novak's office in August, 1927, and that Novak did not at his request draw the note in the instant case.

Mike Harootonian testified that in January, 1925, while at the Stock Yards Bank, he saw appellant hand the deceased $1,000. Charley Kaprelian testified that in July, 1925, the deceased told him he had received $2,000 from the appellant. Appellant introduced in evidence a statement made by the Stock Yards Trust & Savings Bank, to the effect that Zakar Markarian had on January 14, 1924, withdrawn $1,000 from the bank. Also an affidavit of the cashier of the First Union Trust & Savings Bank, in which it is set forth that appellant on May 21, 1923, had withdrawn from said bank $1,000.

The principal contention of appellant's counsel is, that the finding and judgment are manifestly against the weight of the evidence. It does not appear from the bill of exceptions that any motion for a new trial was made by the appellant or that the trial court made any ruling on such a motion. In order to bring before this court for review the question of the sufficiency of

[illegible] his liability and saw his sign for notice [illegible] August [illegible], 1926.

Relative [illegible] author of [illegible] examined in excess of our [illegible] examined the first deed [illegible] note for $2,000, and that it was his [illegible] signed the first deed [illegible] the name of "Schumann [illegible] 1929, and signed it [illegible].

It is [illegible] Bowen's [illegible] quest from the note [illegible].

Life Accident [illegible] while at the [illegible] $1,000. Thereby [illegible] cause [illegible] policy introduced in evidence [illegible] Trust & Savings Bank, [illegible] January 14, 1924, [illegible] death of the maker of the [illegible] which it is not [illegible] stream from [illegible].

The principal [illegible] that the [illegible] the [illegible] the [illegible] any action for a [illegible] trial court [illegible] bale [illegible] the [illegible]

the evidence to sustain the finding. it is necessary that the losing party make a motion for a new trial, and upon its being overruled, except to such ruling, and include such motion, and order overruling the same and exception thereto, together with the evidence, in a bill of exceptions. (Yarber v. C. & A. Ry. Co., 235 Ill. 589; People v. Gabrys, 329 Id. 101, and People v. Leonardi, 338 id. 177.) While this contention need not be considered by us, we have, nevertheless, examined the record and are of the opinion that the trial court was fully warranted under the law and the evidence in disallowing the claim.

It is also contended that the court admitted improper and incompetent evidence pertaining to the genuineness of the signature of the deceased, in that the appellee was permitted to show on the trial that the note was not executed by the deceased, without a special plea supported by an affidavit denying the execution of the note. When, during the course of the trial on January 16, 1931, the appellee endeavored to prove the note a forgery, appellant objected on the ground that the appellee had not filed a plea denying the execution of the note; leave was thereupon granted appellee to file such a plea and the cause was continued to February 6, 1931, to enable the appellee to file such a plea and the appellant to meet that issue. On February 6, 1931, when the trial was resumed, no objection was made to the testimony tending to prove the note a forgery or that no verified plea was filed denying the execution of the note, and a trial was had upon the issue of the execution of the note. Proceeding to trial as if an issue had been made up, when there has been a failure to make an issue, is a waiver of the formal issue and the trial will be treated as though an issue by plea had been formally tendered. (West Chicago Street Ry. Co. v. Krueger, 68 Ill. App. 450; McKinty v. Butts, 217 Ill. App. 234; Ohlendorf v. Bennett,

the evidence is material and lasting. It is one step, then, from having party make a motion for a new trial, and upon the grounds overturned, except to such ruling, and thereafter [illegible] motion, and [illegible] the same and exception thereto, [illegible] evidence, in a bill of exceptions. (Kerby v. [illegible], [illegible] Ill. App. 3d; People v. Wayne, 279 Ill. App. [illegible] (Cook v. [illegible], 258 Ill. App. 1[illegible]). While this contention need not be [illegible] by us, we have, however, examined the record and are of the opinion [illegible] the trial court was fully warranted under the [illegible] in the evidence in allowing the claim.

It is also contended that the court admitted improper and incompetent evidence pertaining to the genuineness or the character of the decedent, in that the appellee was permitted to make on the trial that the note was not executed by the decedent, without a special plea supported by an affidavit denying the execution of the note. Then, during the course of the trial on January 7, 1941, the appellee endeavored to prove the note a forgery, appellant objected on the ground that the appellee [illegible] a plea denying the execution of the note; there was therefore raised questions in the nature a plea and the claim was contested [illegible] January 6, 1941, to enable the appellee to file such a plea [illegible] appellant to meet that issue. On January 6, 1941, when the trial was resumed, no objection was made to the testimony relating to [illegible] forgery or that no verified plea was filed denying the execution of the note, and a trial was had upon the issue of the execution of the note. Proceeding to trial as if an issue had been made up, [illegible] there has been a failure to make an issue, it is a waiver of the formal issue and the trial will be treated as though [illegible] had been formally tendered. ([illegible] v. [illegible], [illegible] App. 480; Kenility v. [illegible], [illegible] App. [illegible]; [illegible] v. [illegible],

241 Ill. App. 537, 545, and Logan v. Mutual Life Ins. Co., 293 Ill. 510, 513.)

It is assigned as error, that the court admitted certain notes and trust deed executed by the deceased for comparison without first submitting them to appellant's counsel. At the time Estate Exhibits 1 to 21 inclusive were offered in evidence, no objection was made that no notice had been given to appellant's counsel, and when the two notes for $225 each were offered counsel objected on the ground that no notice had been served that the Estate would introduce these two notes; counsel for the appellee thereupon offered to show that notice had been served on former counsel for the appellant, but the trial court suggested it was not necessary. In view of the fact that no objection had been made to the introduction of Estate Exhibits 1 to 21 inclusive, we are of the opinion that the introduction of the two $225 notes would not warrant a reversal of the case. Furthermore, it appears from the record that on January 16, 1931, the appellee endeavored to introduce the standards in evidence. In this state of the record appellant had notice that the appellee would offer proof of handwriting by comparison. (Fekete v. Fekete, 323 Ill. 468.)

It is also claimed that the court erred in striking evidence offered by the appellant tending to show money given to the deceased by appellant. This point is not argued by the appellant's counsel. The statement of an alleged error, without argument or the presentation of reasons supporting the contention, is not sufficient to present the point for decision. (American Cigar Co. v. Berger, 221 Ill. App. 285; B. & O. S. W. R. Co. v. Alsop, 176 Ill. 471.) However, the record fails to disclose that any evidence offered by appellant was stricken.

We think none of the errors assigned calls for a reversal of the judgment and accordingly it is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

[illegible] App. 599, 646, [illegible] (Appellate Div. 1st Dep't, [illegible]), [illegible] 816, 816.)

It is analyzed in [illegible] certain notes and [illegible] and accepted by the defendant [illegible] first submitting them to opposing counsel. [illegible] Exhibits 1 to 21 inclusive were offered [illegible] made that no notice had been given [illegible] the two notes for [illegible] that no notice had been served [illegible] two notes; counsel for the appellant [illegible] notice can have served on [illegible] trial court suggested it was not [illegible] no objection had been made to the introduction of Exhibits 1 to 21 inclusive, [illegible] $599 notes [illegible] separate item. The report [illegible] the record [illegible] of handwriting [illegible] (People v. [illegible], [illegible] App. 1941.)

It is also [illegible] evidence offered by the [illegible] decreased by [illegible] counsel. The notes is not [illegible] presumption of reasons [illegible] to present the [illegible] (People v. [illegible]

599 App. 599; [illegible] App. 1941.) However, the [illegible] opposition [illegible] the judgment [illegible]

Affirmed, [illegible] concur.

35123

WINIFRED L. DONLY et al.,
Complainants,

v.

HERMINA BOYER and LAWRENCE
R. BOYER,
Defendants.

HERMINA BOYER and LAWRENCE
R. BOYER, (cross-complainants),
Appellees,

v.

WINIFRED L. DONLY et al.,
(cross-defendants),

On appeal of WINIFRED L. DONLY,
Appellant.

937

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

263 I.A. 648

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This was a bill filed July 1[illegible], 1929, by ~~xxxxxxxxxxxxxx~~ Winifred L. Donly and Jean Libby, as trustee, against Hermina Boyer and Lawrence R. Boyer, for the foreclosure of a certain deed, dated May 1, 1926. The defendants answered the bill and filed a cross-bill against the cross-defendants, Winifred L. Donly and Jean Libby, as trustee, in which they prayed that the trust deed sought to be foreclosed in the original bill and the note secured thereby, may be cancelled and set aside. After issues joined on both bills the cause was referred to a master to take testimony and report his conclusions of law and of fact. The master filed his report, in which he found that the equities were with the cross-complainants and recommended that a decree be entered ordering that Winifred L. Donly deliver up for cancellation the promissory note dated May 1, 1926, and the trust deed securing the same without further payment,

and that Jean Libby, as trustee, be directed to execute and deliver to Hermina Bundscho, a release deed of said trust deed, and that the bill of complaint be dismissed for want of equity. Objections were filed to the report by appellant which were ordered to stand as exceptions. After a hearing, the court overruled the exceptions and entered a decree dismissing the bill for want of equity and granted the relief prayed for by the appellees. To reverse this decree the appellant, Winifred L. Donly, has appealed.

The complainant and cross-defendant Winifred L. Donly will be hereafter referred to as the appellant, and the defendants and cross-complainants Hermina Boyer and Lawrence R. Boyer will be referred to as the appellees.

By the decree, the chancellor found inter alia that the premises described in the trust deed sought to be foreclosed, are located on the west side of Lathrop avenue about 650 feet north of Division street; they are 82.57 feet in width and unimproved; that Lathrop avenue is a north and south street, 80 feet in width; that about April 2, 1926, a Mr. Addie, as the agent of appellant, told Hermina Bundscho of a corner lot that was for sale on the northwest corner of Lathrop and Berkshire, with a frontage of 82 feet; that Hermina Bundscho and a Mrs. [illegible] Romville went with Addie in his automobile to Division street and Lathrop avenue, which was as near as they could get to the lot, and while there, Addie told them that the lot was for sale at $80 per foot; that about April 3, 1926, Addie brought to Hermina Bundscho a contract for the purchase of the lot which Hermina Bundscho signed, and Addie took it away for appellant's signature, which he duly secured. At the time Hermina Bundscho signed the contract she believed the statement made by Addie, that the lot in question was a corner lot; she made no

and that been [illegible], as a [illegible], he [illegible] to [illegible] [illegible] to Herman Bundsche, [illegible] [illegible] [illegible], and that the bill of complaint be eliminated [illegible] [illegible]. [illegible] were filed to the report by [illegible] which [illegible] to stand as exceptions. [illegible] [illegible] [illegible] the exceptions and entered a decree eliminating the bill [illegible] [illegible] and granted the [illegible] prayer [illegible] appellees. To reverse this decree the appellants, [illegible] [illegible] [illegible].

The complainant, [illegible] [illegible] [illegible] will be [illegible] [illegible] to as the [illegible] and the [illegible] and cross-complainants Herman [illegible] [illegible] [illegible] will be referred to as the appellees.

By the decree, the chancellor found _inter alia_ that the premises described in the [illegible] to be foreclosed, are located on the west side of Lathrop avenue [illegible] feet north of Division street; they are 42.87 feet in [illegible] and unimproved; that Lathrop avenue is a north and south avenue, 30 feet in width; that about April 2, 1926, a Mr. [illegible], on [illegible] of appellees, told Herman Bundsche of a corner lot which was for sale on the northwest corner of Lathrop and Berkshire, with a frontage of 80 feet; that Herman Bundsche and a [illegible], [illegible] and [illegible] in his automobile to Division street and Lathrop avenue, [illegible] [illegible] as they [illegible] to the lot, one [illegible] [illegible] said [illegible] that the lot was for sale [illegible] 40 per foot; [illegible] April 2, 1926, [illegible] brought to Herman Bundsche a contract for the purchase of the lot which Herman Bundsche signed, and [illegible] look it over for appellants's signature, which he did [illegible] the time Herman Bundsche signed the contract he believed the statement made by [illegible], that the lot in question [illegible] a corner lot and he [illegible]

personal investigation as to whether or not it was a corner lot; the lot was described in the contract as "Commonly known as the northwest corner of Lathrop and Berkshire, River Forest, Illinois;" that the purchase price provided in the contract was $6,560 or approximately $80 a front foot. Of this amount $3,280 was paid in May, 1926; that on May 1, 1926, a warranty deed was executed and delivered by appellant conveying the premises in question to Hermina Bundscho by legal description only; as a part of the purchase price Hermina Bundscho executed and delivered to appellant a note for $3,302.80 payable on or before six months after date, and to secure the same executed the trust deed sought to be foreclosed. In the warranty deed no reference was made as to whether or not it was a corner lot. By payments made the amount of the note was reduced to $1,302.80, the last payment being made August 6, 1927; that after that date Hermina Bundscho discovered that the land was not a corner lot and she refused to pay the balance of the note, but demanded some appropriate adjustment, claiming that by reason of the lot being an inside lot, the value of the property was less at the time of the contract than the purchase price contracted, Hermina Bundscho offering to reconvey the lot to appellant or to keep it upon the cancellation of the note and trust deed; that the value of the land and said lot was at the time of the contract $60 per front foot or $4,954.60; that Hermina Bundscho has paid to appellant a total of $5,280 principal, $147.36 interest and has also paid $734.30 for taxes and special assessments. It appears from the undisputed evidence that while Hermina Bundscho, Mrs. E. F. Lomville and Addie were at Division street and Lathrop avenue, he said the lot he showed them was a corner lot.

It further appears from the evidence that on June 16, 1924, Albert Bauman and his wife executed a deed that was recorded September 15, 1924, conveying to the Village of River Forest a 33 foot strip

personal investigation [illegible] on a lot on the lot the lot was described in the contract as "commonly known as the northeast corner of Hamilton and Wakefield streets," [illegible] amounting that the purchase price provided in the contract [illegible] approximately 150 a front foot. [illegible] in May, 1926; that on May 1, 1926, [illegible] delivered by plaintiff conveying the premises in question to defendants Bundesko by legal description only; [illegible] part of the [illegible] Herman Bundesko executed and delivered an [illegible] note for $5,302.80 payable to or order via monthly [illegible] and in secure the same executed the usual [illegible] be foreclosed. In the warranty deed no reference [illegible] or one [illegible] corner lot. By payments made [illegible] $1,302.80, the last payment being made [illegible] that date Herman Bundesko discovered [illegible] corner lot and did refuse to pay the balance [illegible] some appropriate [illegible] an inside lot, the value of the property [illegible] contract than the purchase price [illegible] ing to recover the lot [illegible] cellation of the note and [illegible] said lot [illegible] $4,984.60; that Herman Bundesko has [illegible] $5,250 principal. [illegible] taxes and special assessments. [illegible] dence that while Herman Bundesko [illegible] were at [illegible] lot [illegible] than one [illegible] lot.

[illegible] Albert Hanson and his wife [illegible] Ib, 1926, covering [illegible]

of land extending from Lathrop avenue to Ashland avenue, and lying immediately south of and adjoining the premises involved in the instant case, with the express understanding this 33 foot strip was to be used for street purposes only; that on September 26, 1927, the trustees of the Village of River Forest adopted a resolution reciting the execution and recording of the Bauman deed; that the Village of River Forest has not taken possession of the land nor has it been used for street purposes and that the trustees did not desire said land and do not want to open Berkshire street, of which the land would form a part, from Lathrop avenue westward to Park avenue, and by the resolution the proper officers of the village were authorized to execute a deed reconveying all interest acquired by the deed to Albert Bauman and his wife, and a deed was executed and recorded in September of 1927, reconveying the title to said 33 feet to the Baumans; that during the summer of 1927, Lathrop avenue, the street on which the real estate faces was paved, and it was then that Hermina Bundscho discovered the land conveyed to her by the appellant was not a corner lot.

In the answer filed by Hermina Bundscho she alleged that at and prior to the time that she entered into the contract for the purchase of the real estate appellant represented to her that said real estate was and would be a corner lot and that a street, known as Berkshire street would be opened and be immediately south of and adjoining said tract of land; that Berkshire street was never opened up and that said land was not a corner lot and that she relied upon and believed the statement and representations of the appellants that the lot was and would be and become a corner lot and that as an inside lot, the value did not exceed $60 per front foot. The cross-bill filed by appellees contained the same allegations as were contained in the answer and in addition it was alleged that

of land extending from Lambrey avenue to [illegible] avenue, and lying immediately south of and adjoining, the premises involved in the instant case, with the exception [illegible] which [illegible] was to be used for street purposes only [illegible] 1927, the trustees of the Village of [illegible] adopted a resolution rezoning the extension and recording of [illegible] Village of River Forest was not [illegible] of the land nor has it been used for street purposes [illegible] said land and do not seek to open [illegible] street, or which the land would form a part, "the Lambrey avenue extension" [illegible], and by the resolution the proper officers of the village were authorized to execute a deed reconveying, all interest acquired by the town to Albert Damen and his wife, [illegible] September of 1927, reconveying the title to [illegible] feet to the Damens; that during the summer of 1927, Lambrey avenue, the street on which the real estate involved was [illegible] Damenko discovered the land conveyed to him by the appellant was not a corner lot.

In the answer filed by Dominica Damenko she alleged that at and prior to the time [illegible] the contract for the purchase of the real estate [illegible] that the real estate was not a corner lot and [illegible] known as Lambrey street would be opened and be immediately [illegible] and adjoining [illegible] street of land [illegible] up and the [illegible] land was not a corner [illegible] and believed the statements and representations of the [illegible] that the lot [illegible] an inside lot, the [illegible] cross-bill filed by appellees contained [illegible] were contained in the [illegible] alleged that

upon learning that said land was not a corner lot Hermina Bundscho offered to reconvey the real estate to appellant or that appellant allow the damages sustained by reason of the fact that the premises were an inside and not a corner lot; that the difference in the market value of the real estate as a corner lot and as an inside lot exceeded the balance due on the note; that in equity appellees are entitled to have their damages sustained as ascertained by the court and in the event that they exceed the balance due upon said note, that the note and trust deed be cancelled, or that appellees be entitled to have the contract of purchase and the note and trust deed cancelled and a judgment entered against appellant for all money paid by them on account of the purchase price of said lot, together with lawful interest thereon, upon a reconveyance to appellant of said real estate, and that appellees stand ready and willing to accept either of said two propositions as may be found just and equitable by the court.

The main ground relied upon by appellant to defeat the appellees is that there is no allegation in the cross-bill and no evidence in the record which tends to prove that the appellant knew that the false representation charged to her was untrue. There is no merit in this contention. A contract to be obligatory must be justly and fairly made. The contracting parties are bound to deal honestly and act in good faith with each other. There should be a reciprocity of candor and fairness. Both should have equal knowledge concerning the subject matter of the contract. Especially ought all the facts and circumstances which are likely to influence their action be made known. (Lockridge v. Foster, 4 Scam. 573.) When a vendor falsely asserts a fact inducing reliance and action thereon by one without knowledge of the falsehood, under circumstances justifying a reasonably prudent man's belief, and it is be-

upon learning that his lands was not covered in the mortgage offered to recover the real estate. In appellant's petition allege the charges were false and that in fact the mortgages were on file and not a matter [illegible] influence on the market value of the real estate [illegible] corner lot and as a [illegible] lot exceeded the damages due on the note; that in a city [illegible] are entitled to have their rights [illegible] by the court and in the event that they [illegible] upon such note, that the note was [illegible] or [illegible] appellees be entitled to have the [illegible] of [illegible] and trust deed cancelled and a judgment entered [illegible] for all money paid by them on account of the purchase price of the lot, together with lawful interest thereon, upon a [illegible] of said real estate, and [illegible] to accept either of said two propositions [illegible] by the court.

The main ground relied upon by appellant to defeat the appellees is that there is no [illegible] in the case - that no evidence in the record which tends to prove that the [illegible] knew that the false representation charged to [illegible] matter. There is no merit in this contention. A contract to be a fiduciary must be justly and fairly made. The contracting parties are bound to deal honestly and act in good faith with each other. It should be a reciprocity of candor and fairness. Each should [illegible] knowledge [illegible] the subject matter of the contract. Especially ought all the facts and circumstances which are likely to influence their action be made known. (Lockridge v. [illegible], [illegible] 5 [illegible].) When a vendor falsely represents a fact [illegible] and [illegible] thereon by one without knowledge of [illegible] falsehood, under [illegible] absence justifying a reasonable person [illegible], [illegible] be co-

lieved and acted upon with consequent injury, an action for damages will lie. (Endsley v. Johns, 120 Ill. 469, 480, 481.) The owner of property, when he sells it, is presumed to know whether the representation which he makes about it is true or false; and the positive statement thus made of a material fact, if false, is a fraud in law. (Lynch v. Mercantile Trust Co., 18 Fed. 486, 488; Greiling v. Watermolen, 128 Wis. 440, 448; Shultz v. Redondo Improvement Co., 156 Calif. 439; Hoock v. Bowman, 42 Nebr. 80.) In the instant case the appellant asserted as a fact, as shown by her contract, that the lot was a corner lot, known as the northwest corner of Lathrop avenue and Berkshire street, River Forest. This was a material fact in the nature of a warranty (Hoock v. Bowman, 42 Nebr. 80, 82; Shultz v. Redondo Improvement Co., 156 Calif 439; Owens v. Union Bank of Chicago, 260 Ill. App. 595, 601), presumed to be within the knowledge of the appellant, and it induced Hermina Bundscho to enter into the contract for the purchase of the lot; she believed, relied and acted upon the representation made that it was a corner lot. When appellant made this representation, which was false, the representation was fraudulent. (Endsley v. Johns, supra.) Appellant, however, argues, to constitute a fraudulent representation, it must not only appear that the representation was untrue, but also that the party making it knew it to be untrue at the time of making it. We do not desire to be understood as holding that the appellant made the assertion that the lot was a corner lot in bad faith. In fact it is conceded by appellees that such is not the fact. Good faith, however, is no defense where the fraud consists of making a false statement of fact as of the knowledge of the one speaking, for if one asserts a thing to be true of his own knowledge when it is not true, or when he does not in fact know it to be true of his own knowledge is false whether the fact asserted is true or not. And if a person makes a positive statement that a thing that is susceptible

lived and died again with owner [illegible] ... lon to [illegible] still life. (Pudsey v. Johns, [illegible]). The owner of property, may be only it, [illegible] whether the representation which he made about it is true or false; and the positive statement that such of a material fact, [illegible] found in law. (Lynch v. [illegible] Court [illegible], [illegible]; Gwilliam v. Gatewalsh, [illegible]; [illegible] Improvement Co., [illegible]; [illegible] v. [illegible], [illegible]) In the instant case the [illegible] represented as a fact [illegible] by her contract. [illegible] the lot was a corner lot, [illegible] corner of Lindsay avenue and [illegible]. This was a material fact in the mind of [illegible] v. Bowman, [illegible] Mass. 8[illegible], 88; [illegible] v. Rochester Improvement Co., [illegible]; Owens v. Union Park of Chicago, [illegible]), proceeds to be within the knowledge of the [illegible] Burdens to enter into the contract [illegible] of the lot; the believed, relied and acted upon the representation that it was a corner lot. When [illegible] this representation, which was false, the representation was irrelevant. (Pudsey v. [illegible]). Appellant, however, argues, to constitute a [illegible] misrepresentation, it must not only appear that the representation was material, but also that the party making it knew it to be untrue [illegible] making it. [illegible] made the representation that the lot [illegible] lot to be [illegible]. In fact it is conceded by appellee [illegible] the [illegible]. Good faith, however, in no instance [illegible] a false statement of fact [illegible] one side, for if one a recite [illegible] time [illegible] time of his own knowledge [illegible] time or not. [illegible] a person makes a positive assertion that [illegible] possible

of knowledge is true, it is implied that he knows it to be true of his own knowledge, and if he has no such knowledge, he is guilty of actual fraud. (National Bank of Jacksonville v. Hamilton, 202 Ill. App. 516, 521, and cases cited; Rowe v. Phillips, 214 Ill. App. 582.) Where the representations relate to facts which must be supposed to be within the defendant's knowledge proof of their falsity is a sufficient showing of his knowledge that they were false. (Cooley on Torts, 583; Morse v. Dearborn, 109 Mass. 593; Morse v. Skiddy, 62 N. Y. 319; Hall v. Peterson, 338 Ill. 552; Owens v. Union Bank, 260 Ill. App. 595; Wilson Bros. v. Haege, 261 Ill. App. 568, 583.)

It is next contended that the decree was based on the finding that Addie was the agent of appellant who made the representation that the lot was a corner lot and that there is no evidence tending to prove Addie was appellant's agent. Addie did not testify, but from the testimony of Hermina Boyer it appears that the contract which described the lot as the northwest corner of Lathrop and Berkshire, was brought to her by Addie for her signature and that after she signed it it was taken to the appellant for her signature. The appellant signed and accepted the contract procured by Addie and closed the transaction pursuant to that contract, accepting the cash paid and the note and trust deed for the balance. She thus ratified the contract, adopting the representation therein stated that the lot was a corner lot. It would be inequitable to permit the appellant to satisfy so much of the contract as was favorable to her interest and to repudiate that which was unfavorable. (Cochran v. Chitwood, 59 Ill. 53.)

It is also claimed that the allegations of the cross-bill and the decree did not correspond. The allegation of the cross-bill is that appellant at and prior to the time that Hermina

of knowledge is true, it [illegible] (illegible) answer it, or be [illegible] of his own knowledge, and if he has no such knowledge, [illegible] quality of [illegible] from. [illegible] 302 Ill. [illegible] 72, 78, 80, [illegible] Ill. [illegible] 90, 96, 98.) [illegible] must be supported by [illegible] their failing to [illegible] were false. [illegible] 593; Yorke v. [illegible], 68 N. Y. 329; [illegible] 528; Duncan v. [illegible] [illegible] Hedges, 41 Ill. App. 528, 529.)

[illegible] finding that [illegible] the representation [illegible] tion that [illegible] coming to prove [illegible] but from the [illegible] which [illegible] Berkshire, [illegible] after the [illegible] The general [illegible] and closed [illegible] the cash [illegible] thus [illegible] stated [illegible] permit the [illegible] favorable to [illegible] (Goodman v. Atkins, [illegible] Ill. [illegible].)

It is also [illegible] bill and the [illegible] cross-bill is [illegible] [illegible] Kirkham

Bundscho entered into the contract represented that said real estate was and would be a corner lot. The decree finds that the representation was made by Addie, as the agent of appellant. It is, of course, elementary that allegations, proofs and the decree must correspond. The gist of the charge in the instant case was the false representation that the lot was a corner lot. In Vollenweider v. Vollenweider, 216 Ill. 197, the charge was that the fraud was committed in the attorney's office. The decree found appellant used undue influence, that the consideration for the deed was inadequate and insufficient, and that the signature was obtained by fraudulent means. It was claimed this was a variance. The court, p. 201: "We do not see how it can make any difference where the fraud was practiced if the deed was obtained by fraud, as alleged in the bill. There is no substantial variance between the allegation of the bill and the decree."

Appellant also contends that the decree should be reversed because Hermina Bundscho made a personal investigation before she purchased the lot. The evidence disclosed that Hermina Bundscho did not, at the time she purchased the lot, make any investigation to ascertain the truth or falsity of the statement made by Addie and in the contract that the lot was a corner lot. She relied upon the assertion that it was a corner lot and was not required to make any personal investigation. (Bandsley v. Johns, 120 Ill. 481; Thorn v. Prentiss, 83 id. 99, 101.) It was not until Lathrop avenue was paved in the summer of 1927 that she discovered the lot was not a corner lot.

We have considered the arguments of counsel for appellant that the acceptance of the Bauman deed by the Village of River Forest vested the title in the village for street purposes and that cities have the power and right to vacate or abandon streets, but find therein no grounds for a reversal of the decree.

Nebraska [illegible] the [illegible] hand [illegible] case [illegible] lot. [illegible] appeal [illegible] point. It is, of course, [illegible] well [illegible] the false [illegible] lot [illegible]

Vollstedt v. [illegible] the fraud [illegible] appellant used [illegible] was inadequate [illegible] by fraudulent [illegible] The court, [illegible] the fraud [illegible] by [illegible] in the [illegible] of the [illegible] the owners.

Appellant also contends [illegible] be reversed because [illegible] who purchased the lot. [illegible] did not, at [illegible] to [illegible] and in the contract [illegible] the [illegible] any personal [illegible]

v. Prentiss, [illegible] paved in [illegible] corner lot.

[illegible] that the [illegible] fourth [illegible] purposes [illegible] cities [illegible] but find [illegible].

It is finally contended that the appellees are guilty of laches. The point is not tenable. As before stated, Hermina Bundscho learned the real facts in the summer of 1937, and thereafter refused to make any further or additional payments, and offered to rescind the contract and reconvey the lot to appellant. She could, instead of rescinding the contract, stand by the bargain after she discovered that her lot was not a corner lot and recover damages therefor or recoup in damages if sued by the vendor. (Allen v. Henn, 197 Ill. 486.) Moreover, the party guilty of fraudulent conduct will not be permitted by a court of equity to benefit by it. (Stephens v. Clark, 305 Ill. 408, 413; Owens v. Union Bank, 260 Ill. App. 595, 602.) Furthermore, the owner of appellant did not charge appellees with laches. That defense was not raised before the chancellor. It cannot be raised for the first time in this court.

After considering the entire record we are of the opinion that the decree of the Superior court should be affirmed and it is so ordered.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

35132

PORTIA G. LEE,
(Plaintiff) Appellant,

vs.

ROBERT H. SAGE and THE DUCO CORPORATION OF CHICAGO,
(Defendants) Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

263 I.A. 648

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This is an action of forcible detainer brought by plaintiff, Portia G. Lee, against the defendants, Robert H. Sage and The Duco Corporation of Chicago, for the recovery of a vacant lot. The complaint charged that the defendants unlawfully withheld possession of same from plaintiff. A trial was had before the court without a jury, resulting in a finding of not guilty and judgment for costs against plaintiff, and from this judgment the plaintiff appealed to this court.

The controlling material facts are, that the land involved in the instant case is a vacant lot 14½ feet by 48½ feet, known as 2428 South Park avenue, Chicago. On August 29, 1929, plaintiff and the defendant Robert H. Sage executed a written lease whereby plaintiff demised said lot to Sage for the term commencing October 1, 1929, and ending September 30, 1930, at a rental of $1.00 for the term, payable in advance. At the date of the execution of this lease Sage and The Duco Corporation were already in possession of the premises under a previous lease made by plaintiff to one George W. Sheppard, who was president of The Duco Corporation of Chicago, for the period from October 1, 1928, to September 30, 1929. Some time prior to September 11, 1929, and prior to the expiration of the lease of October 1, 1928, plaintiff sent a new lease to Sheppard by mail; it was returned with a letter signed by Sage, in which he said that due to the death of George

38139

PORTIA v. LAW
(Plaintiff) [illegible]

vs.

ROBERT [illegible] AGE and THE [illegible]
OF CHICAGO,
(Defendants) [illegible]

[illegible]

Mr. [illegible] K. [illegible] [illegible]

[illegible] in an action on [illegible]
plaintiff, Portia v. Law, against the [illegible]
and the duo-war [illegible] of [illegible]
lot. The complaint [illegible]
held possession of same from [illegible]
the court without a jury, [illegible]
and judgment for [illegible]
the plaintiff [illegible]

The controlling [illegible]
volved in the instant case [illegible] of 1½ [illegible]
known as 2424 [illegible], Chicago. [illegible]
plaintiff [illegible]
issue [illegible] plaintiff [illegible]
commencing October 1, [illegible]
rental of $[illegible] for [illegible]
the execution of [illegible]
already in possession [illegible]
by plaintiff in one lump [illegible]
Duo corporation [illegible]
to December 31, [illegible]
prior to the expiration of the lease [illegible]
and a notice [illegible]
signed by [illegible]

W. Sheppard he had taken the liberty of changing the lease to his name. Sheppard died June 5, 1929, and Sage succeeded him as president of The Duco Corporation. The fact that Sage signed the lease was satisfactory to plaintiff and so the matter rested until February, 1930, when Sage served a notice on plaintiff reciting that when he (Sage) entered into the lease dated August 29, 1929, with plaintiff, it was with the understanding that plaintiff was the legal owner of the lot; that on January 2, 1930, George F. Harding had served notice on Sage that he (Harding) was the legal and lawful owner of the premises and entitled to immediate possession; that the relationship of landlord and tenant had never been established between Harding and Sage; that Sage had on investigation found that Harding was the lawful owner of the premises and was entitled to possession; that Sage desiring to remain in possession and to avoid being ousted by Harding did acknowledge Harding as his landlord and that Sage has attorned to Harding as his tenant and that Sage considered plaintiff's lease to Sage null and void. Plaintiff took no action on receiving this notice, the rent under her lease having been paid to September 30, 1930. On October 8, 1930, after the expiration of her lease, plaintiff brought the instant action for forcible detainer.

It is conceded that at the time of the commencement of the forcible detainer suit defendants were in possession. On the trial, over objections of plaintiff's counsel, a lease dated and executed March 29, 1928, between George W. Sheppard, then president of The Duco Corporation, and George F. Harding, for the premises in question for the term from March 1, 1928, to April 30, 1929, was received in evidence.

In the instant case the defendant Sage by the execution of the lease dated August 29, 1929, recognized the plaintiff as his

[illegible] W. Stanyard be a [illegible] time [illegible]
name. [illegible] Jones F. [illegible]
dant of the Jones Corporation. [illegible]
was satisfactory to [illegible]
ary, 1970, when Page served [illegible]
when he (Page) obtained [illegible]
plaintiff, it was at [illegible]
gal owner of the [illegible]
had served notice on [illegible]
tal owner of the premises [illegible]
that the termination of tenancy [illegible]
tabling between [illegible]
found that herein was the [illegible]
entitled to possession; [illegible]
and to avoid [illegible]
file instead [illegible]
and that [illegible]
Plaintiff was [illegible]
her lease [illegible]
1970, after the [illegible]
stand action for [illegible]

It is [illegible]
the for [illegible]
trial, over objections [illegible]
evaluated [illegible]
dant of the [illegible]
previous in [illegible]
1970. We [illegible]

[illegible]
of the [illegible]

landlord and attorned to her by the payment of rent. He is, therefore, estopped from denying her title (Carter v. Marshall, 72 Ill. 609), and The Duco Corporation of Chicago being in possession by permission of the defendant Sage, is also estopped from denying plaintiff's right to possession. (Cox v. Cunningham, 77 Ill. 545; Orthwein v. Davis, 140 Ill. App. 107).

Defendants concede the rule, but contend that the maxim that a tenant cannot dispute the title of his landlord has no application here for the reason that he who invokes the advantage of an estoppel must clearly show that the ground of estoppel was not induced by his own misrepresentation, fraud or artifice, defendants arguing that the plaintiff's lease was obtained by misrepresentation, fraud or artifice practiced by the plaintiff, and cite Anderson v. Smith, 63 Ill. 126. In the Anderson case, supra, the court did hold that the tenant may show in defense that his attornment had been procured by a false claim of title, but also held that the burden of proof was on the tenant. In the instant case there was no evidence of misrepresentation, fraud or artifice.

It is also contended the relationship of landlord and tenant between plaintiff and defendants was never created, defendants arguing that they did not obtain possession of the premises by reason of plaintiff's lease. This position is untenable. That defendant Sage executed the lease, paid his rent and was in possession and failed to surrender possession when the lease expired is undisputed. It is an undeniable proposition, that where a party in possession of premises accepts a lease and occupies under it, he is estopped to deny his landlord's title. No dispute as to the title will be tolerated, until the parties are placed in their original positions. (Carter v. Marshall, 72 Ill. 606, 611.) Nor does it make any difference that the tenant was in possession

[illegible]

[illegible] 508), and the Duke [illegible] pounding on the defendant [illegible] plaintiff's rug [illegible] 348; [illegible] v. [illegible], [illegible]

Defendant [illegible] maintain that a lawful owner [illegible] no qualification were for [illegible] voluntary act [illegible] trapped and [illegible] multiple, [illegible] raised by [illegible] plaintiff, [illegible] Anderson case, [illegible] in defense and the [illegible] of title, but also held [illegible] In the instant case [illegible] fraud or mistake.

It is also [illegible] finding of fraud [illegible] mutual regard [illegible] reason of plaintiff's [illegible] defendant [illegible] possession and [illegible] plied to [illegible] a party in possession [illegible] under it, he is [illegible] as to the title [illegible] their [illegible] not [illegible]

at the time the lease was executed, and did not then actually move out and give possession to the landlord; for the legal effect of joining in and accepting the lease is the same as if that had been done. (Orthwein v. Davis, 140 Ill. App. 107, 111.) It makes no difference that the party may have been in possession as a tenant of the former landlord - he is precluded from denying the title of either. (Carter v. Marshall, supra.) The defendant Sage saw fit to assume, by the execution and delivery of the lease, the relationship of tenant to plaintiff. He cannot be heard, in a proceeding at law, to deny the relationship created by the lease, until by some act of the parties or by operation of law, a new and different relationship is created. (Levi v. Beadles, 160 Ill. App. 137, 139.) After accepting the lease, and thereby solemnly admitting the title it is too late to deny it. (Dunbar v. Bonesteel, 3 Scam. 31, 34.)

It is finally urged by defendants that the judgment should be affirmed because plaintiff has failed to prove she was entitled to possession. There is no merit in this contention. Plaintiff's claim to the possession of the premises was based upon the Fourth clause of Section 2 of the Forcible Entry and Detainer Act, which provides whenever any lessee of the lands or tenements, or any person holding under him, holds possession without right, after the determination of the lease or tenancy by its own limitation, condition or terms, or by notice to quit, or otherwise, the landlord may commence forcible detainer proceedings. It is undisputed that the lease was executed, that it had expired, that defendants were in possession at the date of the filing of the complaint and that they have failed to surrender possession.

We must, in the face of this record, reverse the judgment appealed from and enter a judgment in this court finding defendants guilty of unlawfully withholding possession of the premises described in the complaint.

REVERSED WITH A FINDING OF FACT.

Gridley, P. J., and Scanlan, J., concur.

[illegible]

[illegible] joining in and accepting the [illegible] same [illegible] tone. ([illegible]). [illegible] difference [illegible] of the [illegible] either. ([illegible]) [illegible] to assume, by the [illegible] and delivery of [illegible] sanity of course to disbelief. [illegible] law, to deny the [illegible] of the [illegible] only is [illegible] accepting the [illegible] is too late to deny [illegible].

[illegible] would be [illegible] called to [illegible] tiff's claim [illegible] Court's clause of [illegible] which [illegible] person [illegible] Motor in [illegible] tion or [illegible] common [illegible] leave [illegible] possession of the [illegible] have [illegible] [illegible] connection from [illegible] quity of [illegible] in the [illegible].

Orfield, [illegible]

35132

FINDING OF FACT.

We find as a fact in this case defendants did unlawfully withhold possession of the premises in question from plaintiff and that the right to possession is in the plaintiff.

35225

AL. SIMON,
(Plaintiff),
Appellee,

v.

FRED M. JOHNS,
(Defendant),
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

263 I.A. 648

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Al. Simon, plaintiff, sued Fred M. Johns, defendant, in a fourth class tort action. The case was tried by the court and there was a finding in favor of the plaintiff and against the defendant in the sum of $389.54. Judgment was rendered on the finding and the defendant appealed.

The plaintiff sued to recover for damages to his automobile through the alleged negligence of the defendant and Ollie Paytes, who was also made a defendant but was never served with process and the cause as against him was dismissed on plaintiff's motion. In plaintiff's statement of claim it is alleged in substance that his claim is against Fred M. Johns and Ollie Paytes for damages sustained to his automobile on January 30, 1927, at or near the intersection of Ashland avenue and Harrison street, Chicago, Illinois; that plaintiff while in the exercise of due care and caution for his own safety and the safety of his property and while so driving his said automobile in a southerly direction on Ashland avenue at or near the intersection of Harrison street, his automobile was struck with great force and violence by an automobile driven by defendant in a northerly direction in a careless, negligent and incompetent manner, and plaintiff's automobile was further struck with great force and violence by a certain other automobile which was

38825

AL. [illegible],
(Plaintiff),
Appellee,

v.

[illegible] M. JOHN,
(Defendant),
Appellant.

[illegible]

Al. Simon, [illegible], [illegible] Cohen, [illegible],
in a fourth-floor tort action. [illegible]
and there was a [illegible]
the defendant in the case [illegible]
the fire in the [illegible]

[illegible]

automobile enough [illegible]
Ohio system, [illegible]
with process [illegible]
still's motion. [illegible]
in substance that his [illegible]
Physics [illegible]
at or near the intersection [illegible]
Chicago, Illinois that [illegible]
and caution for all [illegible]
while as [illegible]
opinion, [illegible]
[illegible]
driven by [illegible]
and [illegible]
with [illegible]

being driven by the codefendant along and upon Harrison street in a westerly direction, in a careless, negligent and incompetent manner and by reason of the negligence of the defendants plaintiff's car was greatly damaged, etc. In defendant's affidavit of merits it is alleged inter alia that plaintiff did not suffer damages due to any carelessness or negligence on the part of the defendant and alleged the fact that if the plaintiff sustained damages it was solely through the negligence of Ollie Paytes who was traveling in a northerly direction at the time and place.

As grounds for reversal defendant contends that the proofs show that defendant was not guilty of any negligence.

The cause was tried more than four years after the accident. It appears from the evidence that the accident occurred January 30, 1927, at Ashland avenue and Harrison street. Ashland avenue runs north and south and is 80 to 100 feet wide; Harrison street runs east and west, has street car tracks in the central part of the street and is about 50 feet wide. Defendant's automobile was being driven by his chauffeur south on Ashland avenue, on the west side of the street but near the center line; a few feet back of defendant's automobile, a short distance to the right, plaintiff was driving his automobile, also to the south; the traffic going south was heavy; as these automobiles approached Harrison street the stop and go lights showed green, giving them and also those traveling north the right to proceed. An automobile driven by Ollie Paytes was proceeding north on Ashland avenue toward Harrison street, traveling about midway between the center of the street and the east curb of Ashland avenue, at about 25 miles an hour; as defendant's automobile came into the intersection it turned slightly toward the east, the front wheels being between the rails of the eastbound tracks on Harrison street; Paytes did not continue north, but turned sharply before arriving at the eastbound car tracks, to the west,

being driven by the cold-hearted [illegible] treated in a [illegible] distribution, in [illegible] manner due to [illegible] title's [illegible] of merits is [illegible] damages due to [illegible] defendant and [illegible] damages if the [illegible] was travelling in a [illegible] a [illegible] people [illegible] accidents.

The [illegible] the [illegible] January 3, 1967, [illegible] avenue [illegible] street [illegible] part of the [illegible] was being [illegible] on the west side of the street [illegible] of [illegible] was driving [illegible] room was dark, [illegible] stop and no lights [illegible] north the right to proceed. [illegible] was proceeding [illegible] travelling [illegible] such [illegible] car's headlights [illegible] the east, [illegible] driver on [illegible] sharply [illegible]

grazing the right front fender of defendant's automobile, and ran head on into the left or east side of plaintiff's automobile, which had by that time passed defendant's automobile on its right. Defendant's automobile at no time came in contact with plaintiff's automobile. Plaintiff had not seen the Paytes automobile until after it grazed defendant's automobile. When Paytes automobile came to a stop it was facing slightly southwest, the rear wheel straddling the south rail of the eastbound car tracks and the front wheels of defendant's automobile were between the rails of the eastbound tracks. The only conflict is as to what defendant's automobile was doing just prior to the time of the collision between plaintiff's and Paytes automobile. Plaintiff and his witness testified that at the time defendant's automobile was turning east on Harrison street the Paytes automobile was turning west, both these cars being in motion; on the other hand, defendant's chauffeur testified that he stopped the automobile about the center of the street or a little to the right of it, and at that moment the Paytes car touched his right front fender.

The defendant cannot be held responsible for plaintiff's damages merely because his automobile was damaged. Before plaintiff can recover against defendant he must affirmatively prove that defendant omitted to do something which a reasonable man, guided by those ordinary circumstances which ordinarily regulate human affairs, would do, or that he did something which a prudent and reasonable man would not do, which proximately contributed to the collision.

After a careful examination of the evidence we are compelled to hold that there is no evidence of any negligence on the part of defendant's chauffeur.

Accordingly the judgment will be reversed with finding

[illegible] man [illegible] into the left [illegible] on [illegible] automobile, which had by that time grown [illegible] on its tracks. Defendant's automobile [illegible] in issue with plaintiff's automobile. [illegible] automobile [illegible] after it [illegible] automobile came to a [illegible] about attacking the [illegible] wheels of defendant's automobile [illegible] of the [illegible] automobile was doing just prior to [illegible] collision between plaintiff's and defendant's automobiles. [illegible] and bringing suit on Hurlburn street [illegible] both [illegible] defendant's [illegible] of the [illegible] of the [illegible] moment the figure can [illegible] the [illegible].

The [illegible] plaintiff's damages merely [illegible] where plaintiff can [illegible] first determine whether [illegible] ordinary [illegible] by those [illegible] would do, [illegible] can [illegible] not do, when [illegible] on the [illegible].

For a [illegible] to hold [illegible] negligence [illegible] defendant's [illegible].

[illegible] the [illegible]

of fact.

REVERSED ITS FINDING OF FACT.

Gridley, P. J., and Tennlan, J., concur.

35225

FINDING OF FACT.

We find as a fact in this case that the defendant was not guilty of any negligent act.

35236

ANNE KRAMER,
Appellee,

vs.

JULIA KING, INC., a Corporation,
and CARDERS, INC., a Corporation,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

263 I.A. 649

MR. JUSTICE EHRNER DELIVERED THE OPINION OF THE COURT.

Anne Kramer sued Julia King, Inc., a corporation, and Corder's, Inc., a corporation, to recover damages for personal injuries sustained by her. In a trial before a jury there was a verdict and judgment against the defendants for $2500, and they have appealed to this court.

The declaration consisted of three counts. The first alleged that on December 22, 1929, the defendant Julia King, Inc., maintained, operated and controlled certain premises as a restaurant on Dearborn street, near Washington street, Chicago, Illinois, and subsequently changed its corporate name to Carder's, Inc.; that said Carder's, Inc., assumed all the obligations of said Julia King, Inc., including the claim of the plaintiff; that it was the duty of the defendants and each of them to so manage and operate said restaurant as not to injure those who might become patrons of the defendants; that while plaintiff was about to enter the premises of the defendants, with a view of becoming a patron of the defendants, using all due care for her own safety, the defendants, disregarding their duty, negligently, carelessly and improperly maintained and operated the entrance to said restaurant so that by and through the negligence and improper conduct of the defendants, plaintiff was caused to and did trip, stumble and fall, and was severely injured. The second count is like the first except that it did not allege that the defendant Julia King, Inc., had changed its corporate name

ALICE [illegible],

Appellant,

vs.

JULIA AIKO, Inc., a [illegible],
and CARTHAGE, Inc., a [illegible]
corporation,

Respondents.

[illegible]

[illegible] Order's, Inc., [illegible] the court [illegible] granted the juries [illegible] motion [illegible] dict and [illegible] appeal to this court.

[illegible] alleged that on [illegible] K, [illegible], Inc., maintained, [illegible] land [illegible] as a [illegible] ment on Burbank [illegible], [illegible] and [illegible] Inc.; that said [illegible] Inc., [illegible] oil [illegible] Lake, Inc., including [illegible] was the [illegible] the defendants [illegible] and [illegible] tenant [illegible] the [illegible] using oil [illegible] their [illegible] operation [illegible] negligence [illegible] liability was caused to [illegible] injury. The second count is [illegible] the actual [illegible] that the [illegible] Julia Aiko, Inc., had charge of its operation and

to Carder's, Inc., and that Carder's, Inc., assumed all the obligations of Julia King, Inc., but it alleged that the defendants were jointly operating the restaurant in question. The third count was withdrawn. The defendants severally pleaded the general issue and that they did not own, operate or control the premises in question.

The record discloses that on December 22, 1929, the day on which the accident occurred, the defendant, Julia King, Inc., was operating the restaurant in question at 118 North Dearborn street, Chicago, and that it also operated other restaurants and a candy factory. On January 17, 1930, a certificate of incorporation was issued by the Secretary of the State of Illinois to the defendant Carder's, Inc. On February 10, 1930, the defendant Carder's, Inc., purchased of Julia King, Inc., all of its restaurant equipment and leases, but not the candy factory, and commenced the operation of the restaurant at 118 North Dearborn street. The Carder's, Inc., was a separate and distinct corporation and not a new name for Julia King, Inc. There was no evidence tending to prove that Julia King, Inc., had changed its corporate name and that Carder's, Inc., had assumed all the obligations of Julia King, Inc.

Various points are here urged by counsel for defendants as grounds for a reversal of the judgment. It will not be necessary to discuss all of them.

One of the points raised is, that plaintiff has failed to prove the first count of her declaration. It will be observed that this count charges that the defendant Julia King, Inc., operated, maintained and controlled the restaurant in question; that subsequently it changed its name to Carder's, Inc., and that Carder's, Inc., assumed all of its obligations. These were material averments. There was no evidence that its name was changed to Carder's, Inc., or that Carder's, Inc., assumed all of its obligations. On the con-

[illegible]

trary, the evidence was clear that Carder's, Inc., was a separate and distinct corporation organized almost a month after the date of the alleged accident, and that it did not acquire the restaurant until February 10, 1930. It is an elementary and familiar legal principle that the evidence must support the material averments of the plaintiff's pleading, by whatever legal term it may be designated or known; in other words, that the probata et allegata must be in unison, the former supporting the latter. It is a general rule of evidence that the things alleged and proved must correspond; that is, the proof must at least be sufficiently extensive to cover all the material allegations of the party. (Zacuchny v. Chicago Lighterage Co., 157 Ill. 136; Nellis v. Grand Trunk Western Ry. Co., 220 Ill. App. 445.) A plaintiff cannot recover except by proof of the case stated in her declaration. (Ayers v. City of Chicago, 111 Ill. 406; Wabash Ry. Co. v. Billings, 212 Ill. 37.) It will also be noted this count did not allege that there were two corporations, jointly liable, but averred solely that there was only one corporation which, after the alleged injury, changed its name. There is no evidence in the record tending to prove that Julia King, Inc., had changed its corporate name to Carder's, Inc., and had assumed all of the obligations of Julia King, Inc.

It is next contended by defendants' counsel that there is no evidence in the record which can hold both defendants under the second count. This count alleged that the defendants were jointly operating the restaurant in question. Taking all the evidence together, and after considering it with great care, we are impelled to the conclusion that the verdict as to the operation of the restaurant by the defendant Carder's, Inc., was manifestly against the weight of the evidence. The judgment against the defendants is a joint one. A judgment in an action in trespass is a

[illegible] tory, the evidence was given two years [illegible], was [illegible] and distinct corporation organized about [illegible] the alleged contract, [illegible] not [illegible] the treatment until February 10, 1[illegible]. [illegible] principle that the evidence must support the material [illegible] the plaintiff's pleading, [illegible] be [illegible] pated or known; in other words, [illegible] be in unison, the former [illegible] truth of evidence that the [illegible] that is, the proof must [illegible] all the material allegations [illegible] (McCormick v. Midland Lighterage [illegible], 157 Ill. 136; Smith v. [illegible] 220 Ill. 4[illegible]; [illegible]) [illegible] the once stated is not [illegible] (Yoder v. [illegible], 1[illegible] Ill. 406; [illegible] v. [illegible], 18 Ill. [illegible]) It will also be noted this court in not [illegible] these were two corporations, jointly liable, but proved [illegible] only one corporation which, after the alleged [illegible], changed its name. There is no evidence in the record [illegible] that [illegible] had changed its [illegible] to [illegible], Inc., and [illegible] of the [illegible] Inc., also.

It is [illegible] by [illegible] there is no evidence in the record [illegible] the second count. The joint [illegible] were jointly operating the restaurant [illegible]. Taking all the evidence together, and not [illegible] in the least here, we are impelled to the conclusion that the verdict [illegible] the operation of the restaurant in the defendant corporation, Inc., was manifestly against the weight of the evidence. The [illegible] against the defendants is a joint one. A judgment in action in trespass is a

unit as to all defendants against whom it is rendered, and if it must be reversed for error as against one, it must be reversed as to all. (South Side El. R. R. Co. v. Nesvig, 214 Ill. 463, 469; Singer v. Cross, 257 Ill. App. 42, 44; Devine v. Illinois Telephone Construction Co., 159 Ill. App. 600, and cases cited; Livak v. Chicago & Erie R. R. Co., 299 Ill. 218, 226.)

The judgment of the Circuit court is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

unit as to all data items supplied and it is presumed, and it is must be restored for error as regards one, it is not be restored as to all. (Swan Side Cl. v. Co. v. Sewell, Cir. 11). 164, 460; Singer v. Cross, 297 Ill. App. 32, 47; Devine v. Illinois Corporate Construction Co., 190 Ill. App. 4, and cases cited; Hirsch v. Chicago & Erie R. Co., 20 Ill. App. 7, 10.)

The jud ment of the circuit court of Cook county and the cause remanded.

"REMANDED" Cause d.

Bridgy, P. J., and Gordon, J., concur.

97 A

35245

CHARLES J. DEMPSEY, Inc.,
a corporation,
(Plaintiff),
Appellee,

v.

DANIEL P. FRANKLIN,
(Defendant),
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

263 I.A. 349

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This is an action of replevin brought in the Municipal Court of Chicago by plaintiff, Charles J. Dempsey, Inc., a corporation, against the defendant, Daniel P. Franklin, for the recovery of an automobile, valued at $272. The cause was tried by the court without a jury. Finding right to possession in plaintiff. Judgment on the finding. To reverse this judgment defendant appealed.

The affidavit for replevin filed March 14, 1931, alleges that plaintiff is lawfully entitled to the possession of one Ford automobile roadster, motor No. 3214358, of the value of $272, and that on March 1, 1931, defendant wrongfully took and wrongfully detained said goods and chattels from plaintiff. Under the rules of the Municipal Court the defendant was not required to file any pleadings and he only entered his appearance.

The error assigned is that the finding and judgment of the Municipal Court were contrary to the law and the evidence.

The undisputed controlling facts are that on May 13, 1930, the defendant purchased an automobile from plaintiff which was subsequently stolen. The insurance company insuring the automobile against theft settled with defendant for $380 and mailed a check for

CH[illegible], [illegible] et al, Inc.,
a corporation,
(Plaintiff),

Appellee,

v.

DANIEL Z. [illegible] GIR,
(Defendant),

Appellant.

Mr. Justice [illegible] delivered the opinion of the court:

This is an action [illegible] pending in the municipal court of Chicago by plaintiff, [illegible] Corporation, Inc., a corporation, against the defendant, [illegible], a resident, as the recovery of an automobile, [illegible] by the court without a jury. Finding of the [illegible] in possession in plaintiff. Judgment on the finding. [illegible] defendant appeals.

The affidavit [illegible] March 11, 1921, alleges that plaintiff is the [illegible] possession of one Ford automobile [illegible], motor No. [illegible] value of $ 75, and that on March 1, 1921, [illegible] unlawfully took and [illegible] detained said [illegible] plaintiff. [illegible] of the municipal court [illegible] to file any pleading [illegible] Mr. [illegible].

The error [illegible] that [illegible] judgment of the Municipal Court [illegible] according to the [illegible].

The undisputed [illegible] the [illegible], 1921, the defendant [illegible] plaintiff [illegible] sufficiently [illegible]. [illegible] against [illegible] for

that amount to the Universal Credit Company. The Universal Credit Company retained $108 due it from defendant, leaving a balance of $272 to be paid to defendant. The defendant on December 8, 1930, purchased from plaintiff the automobile roadster in question in the instant case for $375. At the time defendant purchased this automobile he informed Clyde Whitman, secretary of plaintiff corporation, who negotiated the sale, that he had $272 coming from the Universal Credit Company; Whitman called the Universal Credit Company and was informed by W. L. Morrissey, credit man for the Universal Credit Company, that it was a fact that defendant had the $272 coming; defendant thereupon paid plaintiff $103 and executed a note for $272 containing a conditional sales agreement, being the balance of the purchase price of the automobile roadster; Whitman directed Morrissey to be sure to see the check went to F. W. Mack Motor Company. The note for $272 containing the conditional sales agreement as well as the agreement was recorded in the office of the Recorder of Deeds of Cook County, Illinois, and on the margin of the note appears a notation that the instrument, after recording, was to be mailed to F. W. Mack Motor Company, 2300 West Madison street. On December 17, 1930, the Universal Credit Company drew a check on the Continental Illinois Bank & Trust Company for $272, payable to defendant and F. W. Mack Motor Company, 2300 West Madison street, which is also the address of the plaintiff, and mailed it to F. W. Mack Motor Company, who received and cashed it; the check was enclosed in a letter addressed to F. W. Mack Motor Company, as follows:

December 16, 1930.

F. W. Mack Motor Company,
2300 West Madison Street,
Chicago, Illinois.

In re: Contract #62746-104-5
Daniel F. Franklin

Gentlemen:

We are attaching our check in the amount of $272.00 made payable to the purchaser and yourselves.

Mr. Whitman, of Chas. J. Dempsey, Inc., called the writer and requested that he be notified when this check was sent out.

Very truly yours,

CREDIT DEPARTMENT."

The Municipal Court was in error when it entered the judgment finding in favor of the plaintiff. The suit was based on a supposed lien given to the plaintiff by defendant's note, containing a conditional sales agreement. To maintain replevin the plaintiff must either be the owner or the person entitled to the possession of the property replevied. (Swain v. First National Bank, 100 Ill. App. 31; affirmed 201 Ill. 416.)

It is apparent from this record that the only ground for issuing the replevin writ was that plaintiff claimed the note for $272 containing the conditional sales agreement, had not been paid. The defendant conclusively proved that the F. W. Mack Motor Company was authorized to receive the $272 due defendant from the Universal Credit Company and that the Universal Credit Company did mail to and that the F. W. Mack Motor Company did receive and cash the check. The note had, therefore, been paid and plaintiff failed to make out its case.

We must, in the face of this record, reverse the judgment appealed from and enter a judgment in this court finding defendant not guilty of wrongfully taking and detaining the automobile in question and that a writ of retorno habendo issue. Plaintiff to pay all costs in this court.

REVERSED WITH FINDING OF FACT.

Gridley, P. J., and McAuliffe, J., concur.

Mr. Thomas, of Thomas & Company, Inc., put in the letter and requested that he be notified as soon as this thing was worked out.

Very truly yours,

[illegible] Mr.

The original lease is now in your hands. It returns the judgment lien in favor of the plaintiff. The suit was based on a supposed lien from the plaintiff by defendant's note, containing a conditional sale agreement. To insure a replevin the plaintiff must allege he is owner or the person entitled to the possession of the property replevied. (Jacobs v. First National Bank, 107 Ill. App. 511; Williams v. Ill. Stamper Co. 111 Ill. 610.)

It is apparent from this letter that a call loan or leasing the replevin [illegible] that particular [illegible] the note for $272 containing the conditional sale agreement, [illegible] not been paid. The defendant consistently [illegible] the [illegible] Credit Company was authorized to receive the [illegible] the Universal Credit Company are that the Universal [illegible] by the call to see what the M. [illegible] Company [illegible] the note. Therefore, [illegible] Philine to make out the case.

A [illegible] in the [illegible] the judgment appears from our [illegible] in the [illegible] the [illegible] not really of [illegible] making the [illegible] in [illegible] from our [illegible] of [illegible] [illegible] costs in this court.

[illegible]

Sincerely, [illegible] Counsel.

34245

FINDING OF FACT.

We find as a fact in this case that plaintiff was not entitled to the possession of the Ford automobile roadster No. 3214358.

35258

ANDREW C. OLSEN and IDA M. OLSEN,
(Plaintiffs) Appellants,

vs.

CONTINENTAL NATIONAL BANK AND TRUST COMPANY, a Corporation, et al.,
Defendants.

CONTINENTAL ILLINOIS BANK AND TRUST COMPANY,
Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

263 I.A. 349

MR. JUSTICE ARBERN DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action in replevin against the Continental National Bank and Trust Company and Continental Illinois Bank and Trust Company to recover possession of a trust deed and seventeen promissory notes aggregating $12,500, which they alleged were wrongfully taken and wrongfully detained by defendants. The sheriff was unable to find the property. Plaintiffs' declaration includes a count in trover. The Continental National Bank and Trust Company filed pleas of the general issue. The Continental Illinois Bank and Trust Company filed a plea of not guilty and two special pleas; the first alleged that the trust deed and notes were the property of said defendants and not of the plaintiffs the second alleged that the trust deed and notes were the property of F. S. Kunkel, doing business as F. S. Kunkel & Co., and not of plaintiffs and that all of said notes were made payable to bearer and bear no endorsement thereon; that the trust deed and notes were pledged, transferred and delivered to the defendant by F. S. Kunkel on May 18, 1929, as collateral to secure, in part, the payment of a loan by defendant to F. S. Kunkel & Co., in the sum of $20,000 evidence by a collateral note, upon which there remains unpaid on February 13, 1930, $16,837.50; that said collateral to said collateral note was received by the defendant in due course

of business, for a valuable consideration before maturity, and without notice whatsoever of any defect, if any, in the title of said F. S. Kunkel or said F. S. Kunkel & Co., to said collateral, or any part thereof, and without notice whatsoever of any right, claim or interest, if any, of plaintiffs. During the trial, on motion of plaintiffs, the suit was dismissed as to Continental National Bank and Trust Company. The cause was tried before the court without a jury. Finding defendant not guilty. Judgment on the finding. To reverse this judgment, plaintiffs appealed.

There is no dispute as to the facts. It appears that plaintiffs owned real estate in Chicago, which was sold and conveyed to Morris Rifkin and Philip Williams on December 12, 1927, and took back a purchase money mortgage for $16,000, being the trust deed and balance of the notes involved in the instant case. F. S. Kunkel negotiated the sale. The trust deed and notes were delivered to F. S. Kunkel on August 15, 1928, for the purpose of having Kunkel collect the money on the notes as they came due; Kunkel did collect the money on some of the notes and remitted to plaintiffs. Each of the notes was made payable to bearer, bore no endorsement whatever thereon and was complete and regular upon its face. The notes and trust deed all provided that the notes were payable at such banking house in the City of Chicago as the legal holder of the same might from time to time appoint and in default of such appointment then the same were payable at the office of Monahan & Monahan, Chicago. The trust deed securing these notes was to the Chicago Title & Trust Company as trustee. F. S. Kunkel had been engaged in the general real estate and insurance brokerage business in Logan Square in Chicago for twenty-five years and owned the building in which his office was located and several other pieces of property on Milwaukee avenue, and was a member of the Logan Square Business Men's Associati

He had been doing business with the defendant, especially with its trust department, for some years prior to May 18, 1929, particularly with a Mr. Lohr, vice president of defendant; Lohr brought and introduced Kunkel to John J. Geddes, also a vice-president of defendant, in April, 1929, stating he had known Kunkel for years; Geddes had Kunkel make a financial statement as to his assets and liabilities, from which it appeared that Kunkel was worth over and above his liabilities $223,675. A loan of $9,000 was made to Kunkel on May 9, 1929. On May 18, 1929, Kunkel desired a loan of $20,000. He saw Geddes and produced the trust deed and notes involved in the instant case and other collateral. The loan was made, Kunkel signed a collateral note for $20,000, received the proceeds of the loan, and delivered to defendant the trust deed, notes, mortgage policy and fire insurance policy, also other collateral. Geddes made no inquiries concerning Kunkel or the collateral left with Geddes. Kunkel did not mention that plaintiffs had any right, title or interest in the trust deed and notes and defendant had no knowledge that the plaintiffs claimed any interest in the trust deed and notes until the commencement of the replevin suit. There is no evidence of any misconduct of Kunkel prior to the transaction in question or of any profit accruing to defendant from its participation in the transaction. Plaintiffs did not know that Kunkel had pledged the notes until a few days before the instant suit was started.

Plaintiffs' position, as appears from the statements in the briefs and in the oral argument, is in substance that defendant did not exercise the diligence required of it under the law when it acquired the notes and trust deed; that it did not pursue the course that an ordinarily prudent business institution should pursue, in other words, that it was not a holder in due course.

Murray v. Lardner, 69 U. S. 110, was a case in which Lardner sought to recover three bonds, payable to bearer, which had been stolen from him and sold to Murray, who was a broker engaged in the negotiations of such bonds in New York. He purchased them in the ordinary course of business for a valuable consideration without knowledge of any defect of title. In that case the court, quoting from Goodman v. Simonds, 61 U. S. 343, said, page 121: "The party who takes it (referring to a negotiable bill of exchange) before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession." And the court held that neither negligence, nor knowledge of suspicious circumstances, nor failure to inquire into the circumstances, will in or of itself be bad faith in a holder of negotiable paper who purchases it in the ordinary course of business. The same rule has been repeatedly affirmed in Y. M. C. A. Gymnasium Co. v. Rockford National Bank, 179 Ill. 599; Schintz v. American Trust & Savings Bank, 152 Ill. App. 76; Peterson v. Emery, 154 Ill. App. 294; First National Bank of Kattoon v. Hesse, 158 Ill. App. 122; First National Bank of McLeansboro v. The Cloud State Bank, 213 Ill. App. 485; Page v. W. F. Hallam & Co., 212 Ill. App. 462; Kavanagh v. Bank of America, 239 Ill. 404, and Justice v. Stonecipher, 267 Ill. 448.

Par. 72, sec. 52 of Ch. 98, Cahill's R. S. 1931, p. 1954 (Negotiable Instrument Act) defines a holder in due course as one

who has taken the instrument under the following conditions: 1. That the instrument is complete and regular upon its face. 2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact. 3. That he took it in good faith and for value. 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it; Par. 79, sec. 59 of the same Chapter provides that every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he acquired the title as a holder in due course; Par. 75, sec. 55, provides that a title is defective where it is negotiated in breach of faith or under such circumstances as amount to a fraud; and Par. 76, sec. 56, provides that to constitute notice of infirmity or defect in the title of the person negotiating the note, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. The notes in the instant case were the property of the plaintiffs, delivered to their agent Kunkel for collection, who transferred them to defendant for value before they were due. Under Par. 79, sec. 59, defendant is deemed prima facie to be a holder in due course. When, however, plaintiffs proved they were the owners of the notes, the title of Kunkel to the notes at the time he delivered them to defendant was defective, and the burden was then on defendant to prove that it acquired title in due course. (Hide & Leather Bank v. Alexander, 184 Ill. 416; Merchants' Loan Co. v. Welter, 205 Ill. 647.) The defendant thereupon proved that on May 18, 1929, Kunkel, desiring a loan of $20,000, saw Geddes, vice-president of defendant, and produced the trust deed and

[illegible]

notes involved in the instant case, and other collateral. The loan was made, Kunkel signing a collateral note for $20,000, received the proceeds of the loan and delivered to defendant the trust deed, notes, mortgage policy and fire insurance policy. Kunkel did not mention that plaintiffs had any right, title or interest in the trust deed and notes and the defendant had no knowledge that the plaintiffs claimed any interest in the trust deed and notes. The burden then devolved on plaintiffs to show that they were entitled to the trust deed and notes. (Bell v. McDonald, 308 Ill. 329.) This they claim they did, and in arguing for a reversal contend that they have proven bad faith on the part of defendant and that Tollifsen v. Middle States Inv. Co., 253 Ill. App. 320, is decisive of the instant case. We have examined that case and cannot agree with plaintiffs' contention. In that case the Middle States Investment Company, who purchased the note, had profited by an extremely large discount of the note, but such is not the fact in this case - defendant here having paid more than the full value. In the Middle States Investment Company case it also appeared that the note had been purchased from the trustee named therein as payee, while in the instant case the notes were payable to bearer.

After consideration of plaintiffs' argument and the record, we conclude that the defendant sufficiently satisfied the burden resting upon it and made good its claim of being an innocent purchaser in due course without any knowledge of a defect in Kunkel's title and therefore complied with the Negotiable Instrument Act and that plaintiffs have failed to prove as against defendant they were entitled to the trust deed and notes.

We have considered the contention of plaintiffs' counsel, that the trial court erred in admitting over objections a sworn statement of Kunkel of his alleged assets and liabilities at the time he obtained a $9,000 loan from defendant, and the evidence

notes involved in the instant case, [illegible] was made, should [illegible] proceeds of the loan [illegible] mortgage policy and [illegible] that plaintiffs had [illegible] and notes and the defendant had no knowledge [illegible] claimed any interest in the trust deed [illegible] devolved on plaintiffs in case that they were entitled to the trust deed and notes. (Hall v. Lonsdale, 308 Ill. [illegible]) [illegible] they claim they did, and in support, for a reversal [illegible] have proven bad faith on the part of defendant [illegible] v. Middle States Inv. Co., 298 Ill. App. 38, in relative [illegible] stant case. [illegible] plaintiffs' contention. [illegible] Company, was authorized the [illegible] discount of the note, but [illegible] not the fact in this case - defendant were having paid more than [illegible] full value. In the [illegible] investment company case it also appears that the note [illegible] purchased by the trustee named [illegible] in question, while in the instant case the notes were [illegible] year.

After consideration of [illegible] record, we conclude that the defendant sufficiently [illegible] burden resting upon it and made, [illegible] purchaser in the course without any knowledge of [illegible] title and therefore complied with the [illegible] that plaintiffs have failed to prove [illegible] entitled to the trust deed and notes.

We have considered the [illegible] counsel, but the trial court [illegible] a sound exercise of [illegible] at the time he obtained a [illegible] the evidence

of Orlin F. Culp. The objection to the sworn statement was, that it had not been obtained in connection with the transaction involved in the instant case. The statement was not offered in evidence until after plaintiffs claimed defendant had been guilty of bad faith in taking the notes from Kunkel and failing to make inquiries concerning Kunkel, and it was for the purpose of showing that the defendant had acted prudently that it offered the statement. The objection to the testimony of Culp was that it pertained to what happened after the maturity of the Kunkel collateral note. He testified that he had a conversation with George Kunkel, a son of F. S. Kunkel, and that in this conversation George Kunkel never mentioned the name of the Olsens. The merits of the case were not affected by the action of the court of which complaint is made, and the errors in that respect, if they existed, do not, in our opinion, warrant a reversal.

The judgment of the Superior court is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

of Orlin v. Ulup. The objection to the [illegible], and it had not been obtained in [illegible] the [illegible] action involved in the [illegible] case. [illegible] and the evidence until after [illegible] had been qui[illegible] of had fallen in [illegible] inquiries concerning [illegible] that the [illegible] ment. The objection to the [illegible] tained is what happened after [illegible] note. He insisted that he [illegible] e non sq. [illegible] never mentioned the name of the [illegible] were not affected by the action [illegible] made, and the error is that [illegible] our opinion, warrant a reversal.

Also [illegible] in [illegible].

[illegible]

Griffey, [illegible], [illegible].

35363

THE FLASH SALES CORP'N,
a Corporation,
(Complainant)

vs.

L. C. BERRY et al.,
Defendants.

R. M. EDDY FOUNDRY COMPANY,
a Corporation,
Cross-Complainant,
(Appellee)

vs.

L. C. BERRY et al.,
Cross-Defendants.

On Appeal of L. C. BERRY and
JOHN M. BERRY,
Appellants.

INTERLOCUTORY APPEAL FROM
CIRCUIT COURT OF COOK
COUNTY.

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

An injunction pendente lite was issued, after notice to defendants, upon the bill filed by The Flash Sales Corp'n., and cross-bill filed by R. M. Eddy Foundry Company, restraining L. C. Berry and John M. Berry from proceeding with certain law actions pending in the Superior Court of Cook County and Municipal Court of Chicago, and ordering them to bring into the Circuit Court all claims they may have in respect to various notes now in said causes. To reverse this injunction the appellants L. C. Berry and John M. Berry prosecute this appeal.

For convenience the complainant will hereafter be referred to as the Sales Company, L. C. Berry and John M. Berry as the appellants, and R. M. Eddy Foundry Company as the appellee.

Appellants moved to strike the bill of exceptions, abstract, additional record and brief and argument filed by appellee. We took this motion with the case. The motion is now denied.

THE PLANT SALT'S COMP'S,
a Corporation,
(Complainant)

vs.

L. C. HENRY et al.,
Defendants.

H. H. HENRY FOUNDRY COMPANY,
a Corporation,
Cross-Comp. Plaint.
(Appellee)

vs.

L. C. HENRY et al.,
Cross-Defendants.

On Appeal of L. C. HENRY and
JOHN H. HENRY,
Appellants.

Mr. JUDGE KENNA DELIVERED THE OPINION OF THE COURT:

An injunction pendente lite was issued, after notice to defendants, upon the bill filed by the plaintiff, and cross-bill filed by H. H. Henry Foundry Company, restraining L. C. Henry and John H. Henry from proceeding with certain lawsuits pending in the Superior Court of Cook County and Circuit Court of Cuyahoga, and ordering them to bring into the circuit court all claims they may have in respect to various notes and liens. To reverse this injunction the appellants L. C. Henry and John H. Henry prosecute this appeal.

For convenience the complainant will be referred to as the Salts Company, L. C. Henry and John H. Henry as the appellants, and H. H. Henry Foundry Company as the appellee.

Appellants moved to strike the bill of complaint, abstract, additional record and brief and argument filed by appellee. We take this motion with the case. The motion is overruled.

On April 22, 1931, the Sales Company filed its bill, in which it alleged in substance that appellants filed actions at law against the Sales Company and appellee on certain promissory notes made by the Sales Company payable to the order of appellee and by it endorsed in blank; that all are still pending; that each suit is substantially identical and the same defenses will be raised and must be adjudicated in each, which creates a multiplicity of suits; that each of said notes was made and delivered on behalf of Sales Company without consideration; that complainant received no moneys, rights or forbearances or other consideration, and payee did not extend any credit or forbearance; that on information and belief appellants, with Charles M. Eddy, now deceased, formerly president of appellee, fraudulently conspired and confederated to represent to Sales Company that the notes were to be executed to benefit and on behalf of certain contractual relations then existing between appellee and Sales Company; that neither appellee nor Sales Company received any benefit, and if any considerations were given for said notes by appellants, the same, in furtherance of said confederacy and conspiracy were diverted by and to the use of said Charles M. Eddy, and he individually received such benefit, if any was paid by appellants; that the making of each of said notes was caused by reason of said fraud and circumvention of appellants and Charles M. Eddy, and that appellants knew and acquiesced in Eddy's individually receiving such benefit; that on information appellants are not bona fide purchasers and in the law actions do not allege they are and they have been repeatedly requested to show Sales Company detailed information concerning what consideration was paid, if any, by appellants for said notes, but they have refused and continue to refuse such information; that Sales Company is ready and willing to do what in equity it is called upon to do in the premises; that the information is purely in the knowledge of appell-

[illegible]

in which it alleged in substance [illegible] defendants at
law against the Sales Company [illegible] on the ground of
notes made by the [illegible] company [illegible]
and by it endorsed in blank; [illegible] that the
suit is substantially identical [illegible] and
and must be adjudicated in [illegible], which [illegible]
suits; that much of said [illegible] and [illegible] of
Sales Company without [illegible] money, rights or interest [illegible]
did not exhibit any credit or [illegible]; [illegible] <u>failed</u> [illegible]
creditors of [illegible] represent to [illegible]
benefit and on reliance [illegible]
lating between [illegible] and a [illegible]
nor Sales Co. only receive [illegible] were given for said [illegible]
of said conferences and [illegible] were [illegible]
of said Charles W. [illegible] if any was said [illegible] was caused by reason of [illegible]
and Charles W. [illegible] Sady's indivisibly [illegible] <u>[illegible]</u>
appellants are not <u>[illegible]</u> do not allege they are [illegible]
Sales Company [illegible] was paid, if any, by [illegible] and continue to release [illegible]
and within, to do [illegible]
premises; [illegible]

ants and a discovery thereof is necessary and vital for Sales Company's proper defense and the remedy at law is inadequate; that the books and records of appellee contain no entry of any kind concerning the execution or delivery of the notes and that by reason thereof an accounting is or will be necessary between Sales Company and appellee with reference to liability as between Sales Company and appellee and this situation will cause circuity of action in addition to multiplicity of suits and that an additional action will be made necessary by Sales Company against appellants by reason of said confederacy and conspiracy; that the consideration given by appellants, if any, was wholly inadequate and in itself amounts to fraud and unconscionable conduct; that the remedy at law is wholly inadequate for the further reason that the personal representative of Charles Eddy is not made party defendant to said law actions and that they could not at law be made defendants in the actions brought by appellants; that the personal representative of said Charles Eddy is a necessary and indispensable party to any suit that would dispose of the various claims. The prayer of the bill is, that appellants be enjoined from further prosecuting said law actions and that they set forth a true and just account of their acts with reference to the Sales Company and appellees and Charles Eddy individually; that an accounting be taken between Sales Company and appellee regarding said notes and the rights of Sales Company and other defendants.

On April 25, 1931, appellee filed its cross-bill, in which it alleged in substance that in addition to the law actions mentioned in the original bill of Sales Company, appellee is a defendant in two other separate actions, in the first of which appellants are plaintiffs, and in the second Fridolin Pabst is nominal plaintiff. In the latter action, as far as appellee is able to ascertain, appellants are the real and true parties and Fridolin

ants and a [illegible] every [illegible] necessary [illegible] com-
pany's secret defense and the records [illegible] that the
books and records of said [illegible] contain [illegible]
ing the execution or delivery of the [illegible]
an accounting is necessary [illegible]
appellee with reference to liability [illegible]
appellee and this decision will cause discovery [illegible]
tion to multiplicity of suits [illegible] will
be made necessary by false [illegible] of
said confederacy and conspiracy; that [illegible]
appellants, [illegible] to
fraud and unconscionable [illegible] is
inadequate for the fact [illegible] the personal representative
of Charles Eddy is not made party [illegible]
that they could not at law be made defendants in the actions [illegible]
by appellants; that the personal representative of said Charles Eddy
is a necessary and indispensable party to any suit [illegible] dis-
pose of the various claims. The prayer of the bill is, that ap-
pellants be enjoined from further prosecution of the actions and
that they set forth a true and full account of their dealings with ref-
erence to the company and [illegible] individu-
ally; that an accounting [illegible]
regarding said notes [illegible] de-
fendants.

On April [illegible], [illegible]
which it alleged in substance [illegible]
mentioned in the original bill of [illegible] is a de-
fendant in two other separate actions, [illegible] ap-
pellants are plaintiffs, and in the second [illegible] is
nominal plaintiff. In the latter action, [illegible] appellee is able
to ascertain, appellants are the real [illegible]

Fabst brought said action as agent for them and to confuse appellee in its defense and to try to avail himself for the said appellants of rights in the notes which would not be available to appellants as against appellee; that appellee is not indebted on said notes; that no consideration has moved to it as the result of signing said notes; that no record is contained in the books of appellee concerning the receipt of any sum whatsoever for said notes; that it has no knowledge of any moneys received by it from any of the defendants on account of endorsement or execution of any of said notes; that there are no credits on its books showing the receipt of said indebtedness; that to avoid a multiplicity of suits an accounting between Sales Company and appellee and the trial of the several actions now pending and the notes signed and endorsed by appellee for Sales Company, appellants should be enjoined from proceeding on said actions and that all matters between the appellants and appellee and Sales Company should be merged and brought before the Circuit court. The prayer of the cross-bill is, that an order be entered enjoining appellants from prosecuting said suits; that all of them may be merged and appellants instructed to proceed with all matters at issue between them and that appellants and Fridolin Fabst be enjoined from proceeding with the litigations.

On June 16, 1931, the chancellor entered the following order:

"IT IS HEREBY ORDERED that L. C. Berry and John M. Berry, and each of them, their agents and attorneys, be and they hereby are restrained and enjoined from further prosecuting at law their respective actions or proceeding in any manner, shape or form in any and all of the cases now pending, as follows: Superior Court case Nos. 529081, Municipal Court case No. 1434724, 2751549, and 2751550, pending the further order of this court.

"And the said L. C. Berry and John M. Berry are hereby further ordered to bring into this court any and all claims or actions they, or either of them, may have in respect to the various notes now in suit in the aforesaid cases at law.

"IT IS FURTHER ORDERED that the aforesaid parties submit themselves and such causes of action, if any they have, in regard to said notes to the jurisdiction of this court, and that they make full and direct answer and a complete disclosure of the

[illegible]

[illegible] and brought before the [illegible] court. The [illegible] [illegible] may be [illegible] at least [illegible] joined from [illegible] with [illegible].

[illegible]

order:

[illegible]

facts and circumstances touching their ownership of and rights in said notes, as prayed in the cross-bill filed herein."

Counsel for appellants presents a large number of points in support of his argument in this court, why the injunctional order should be reversed. It will not be necessary to discuss all of them.

The power to enjoin the prosecution of a law action is sparingly exercised. It is only where it clearly appears that the prosecution of the law action will result in a fraud, gross wrong or oppression that a court of equity will interfere with the general right of a person to prosecute his suit in any jurisdiction he sees fit and restrain him from the prosecution of such suit. In Real Institute Co. v. Stuckhart, 281 Ill. 526, 529, it was said: "The rule is well established that where another court has acquired jurisdiction of a cause a court of chancery cannot be resorted to for the purpose of ousting such a court of jurisdiction unless some equitable defenses are shown which cannot be availed of in the suit at law, or some other equitable grounds for the intervention of a court of equity are shown. Ross v. Buchanan, 13 Ill. 53; Mason v. Piggott, 11 id. 85." To justify equitable interposition, it must be made to appear that an equitable right will otherwise be denied the parties seeking relief. (Royal League v. Kavanagh, 233 Ill. 175, 183.) Where a cout of law has first acquired jurisdiction a court of equity will not oust it of its jurisdiction unless there are defenses unavailable at law, or unless there are some equitable circumstances in the case of which one of the parties cannot avail himself. (Hartford Fire Ins. Co. v. Ledford, 151 Ill. 413, 416; see also County of Cook v. City of Chicago, 158 Ill. 524; Vanatta v. Lindley, 198 Ill. 40.) Appellee's counsel apparently concedes this rule and replies that the bill charges appellants with fraud, and that fraud is a recognized subject of general equity jurisdiction. The question then presented is, Do the allegations of the bill and cross-bill show such facts

as would warrant the entry of the order appealed from? In the bill on information and belief are allegations in general terms, unsupported by averments of fact, that the execution of the notes was procured by fraud and that no consideration was received by the Sales Company for said notes. No facts or circumstances which constitute the fraud are alleged. It has repeatedly been held that the facts and circumstances which constitute fraud should be set out clearly and concisely and with sufficient particularity to apprise the opposite party of what he is called upon to answer. (Bouxsein v. Granville Nat. Bank, 292 Ill. 500, 503; Naylin v. C. A. & DeK. R. R. Co., 297 id. 130, 133; Dickinson v. Dickinson, 305 id. 521, 527.) In Smith v. Brittenham, 98 id. 188, the court said: "Charges of fraud should not be general, but the facts should be stated on which the charges are based." In Murphy v. Murphy, 189 Ill. 360, 365, the court, quoting with approval from Haenni v. Bleisch, 146 Ill. 262, said: "In alleging fraud, it is well settled both at law and in equity, that the mere general averment, without setting out the facts upon which the charge is predicated, is insufficient. *** It is essential that the facts and circumstances which constitute it (the fraud) should be set out clearly, concisely, and with sufficient particularity to apprise the opposite partyof what he is called upon to answer." Moreover, the charges of fraud are on information and belief only. This is not sufficient. (Murphy v. Murphy, 189 Ill. 360, 365; Chilvers v. Huenemoerder, 250 Ill. App. 499, 505, and cases cited.

The bill also alleges on information and belief in general terms, a conspiracy. An allegation of conspiracy must show the facts upon which it is based. (Doose v. Doose, 300 Ill.,134,139.)

The appellee contends that the bill and cross-bill seek recovery and that where the discovery is sought is indispensable to

as would warrant the entry of the order appealed from? In the still on information and belief are allegations in general terms, unsupported by averments of fact, that the execution of the notes was procured by fraud and that no consideration was received by the Sales company for said notes. No facts or circumstances which constitute the fraud are alleged. It can reasonably be said that the facts and circumstances which constitute fraud must be set out clearly and concisely and with sufficient particularity to apprise the opposite party of what is relied upon to answer. (Bourassin v. Brunswick Rec. Corp., 38 Ill. App. 2d 1, 5; Smith v. G. A. & Son, M. B. Co., 327 Ill. App. 150, 162; Ill. Cent. R. R. Co. v. Cox, 205 Ill. 321, 327.) In Smith v. Williamson, 9 Ill. App. 2d 1, the court said: "Charges of fraud should not be general, but the facts should be stated on which the charges are based." In Kane v. Smith, 1 Ill. App. 2d 360, 365, the court, quoting with approval from Kochel v. Bleiman, 1 Ill. App. 2d 111, 120, said: "An allegation that, it is not settled both as law and in equity, that the mere general averment, without setting out the facts upon which the charge is predicated, is insufficient. ... It is essential that the facts and circumstances which constitute it (the fraud) should be set out clearly, concisely and with sufficient particularity to apprise the opposite party of what he is called upon to answer." Moreover, the [illegible] of fraud are on information and belief only. [illegible] (Kurtz v. Murphy, 1 Ill. App. 2d 111, 120; Williams v. Sandquist, [illegible] Ill. App. 405, 409, and cases cited.

The bill also averred [illegible] in general terms, a mere fraud. An allegation of a conspiracy must show the facts upon which it is based. (Moore v. Shaw, [illegible] Ill. App. 2d 1, 10.)

The appellee contends that the [illegible] recovery and that where the discovery is sought in independence of

the ends of justice, the bill will be entertained. Its right to discovery is predicated on the allegations of the bill in which it is alleged that the books and record of appellee contain no entry of any kind concerning the execution or delivery of the notes and on the cross-bill which alleges that diligent search of appellee's records and books fails to disclose any evidence of such transactions; that no evidence appears on its books showing any sum of money received by appellee for endorsing the notes. Lack of knowledge alone will not confer jurisdiction upon a court of equity (Postal Telegraph-Cable Co. v. Staehle, 188 Ill. App. 464), and the mere fact that it may be more convenient to maintain an action in equity than at law does not justify a resort to equity, if the remedy at law is adequate. (Vanatta v. Lindley, 198 Ill. 40, 43.) Furthermore, the bill and cross-bill are not for discovery alone, but the Sales Company and appellee seek to have the merits of the actions at law adjudicated by the chancery court. Under such circumstances, the bill must show that the evidence rests exclusively with the appellants. (Robson v. Doyle, 191 Ill. 566, 569.) Neither the bill nor cross-bill allege that the facts are known to no other person than the appellants. Such an averment is necessary to a bill for discovery and final relief. (Vennum v. Davis, 35 Ill.568.) On the contrary, it clearly appears from the exhibits attached to the bill that the notes were executed by Joseph Eifel as president and secretary of the Sales Company, who also signed the bill. It must be assumed that he was acquainted with the transactions connected with the execution of the notes.

Appellee also insists that the issues and parties involved in the law actions are identical and can and should be merged in one trial, thus obviating a multiplicity of suits. To this contention it is sufficient answer to say that before a court of equity

the ends of justice, the bill will be enforced. [illegible] to discovery is precluded by the allegations of the bill, in that it is alleged that the books and record of defendant do not show any of any kind concerning the accounts or delivery of the notes and of the cross-bill which allege that defendant secured defendant's records and books fails to disclose any evidence of such transactions; that no evidence appears on the issue showing any use of money received by defendant for redeeming the notes. [illegible] of sufficiency alone will not confer jurisdiction upon a court of equity (Postal Telegraph-Cable Co. v. Lowery, 1[illegible] Ala. [illegible], and the mere fact that it may be said certain [illegible] equity then at law does not just ify a resort to a bill, if the remedy at law is adequate. (Lambie v. Lanier, 1[illegible] Ala. [illegible], 4[illegible]). Furthermore, the bill and cross-bill are not for a recovery [illegible], but the Sales Company and defendant seek to have the rights of the actions at law adjudicated in the chancery court. Under such circumstances, the bill must show that no evidence [illegible] with the chancellor. (Dobson v. Davis, 7[illegible] Ala. [illegible]). Neither the bill nor cross-bill allege [illegible] known to [illegible] person than the [illegible]. Such a verment is [illegible] to a bill for discovery and final relief. (Young v. Irvin, 3[illegible] Ala. [illegible]). On the contrary, it clearly appears from the [illegible] attached to the bill that the notes were executed by Joseph [illegible], as president and secretary of the Sales Company, who also signed [illegible]. It must be assumed that no [illegible] had [illegible] transactions connected with the execution of the notes.

[illegible] also [illegible] waived in the law actions [illegible] in one trial, thus [illegible] a multiplicity [illegible]. [illegible] contention it is sufficient answer to say that [illegible] court of equity

will assume jurisdiction to avoid a multiplicity of suits, the complaining party must first establish his defenses at law. (Imperial Fire Ins. Co. v. Gunning, 81 Ill. 236; Lloyd v. Catlin Coal Co., 210 Ill. 460.)

It is also to be noted that the two essential averments in the bill charging fraud and conspiracy in general terms, are upon information and belief. To warrant the issuance of a temporary injunction, upon the allegations of the bill, the essential averments must be verified and such verification must be positive and not on information and belief. (Schroth v. Siegfried, 162 Ill. App. 595, and cases cited.)

Under the circumstances in the instant case as shown by the bill and cross-bill, we are of the opinion that no equitable defenses are shown which cannot be availed of in the law actions and that the appellee has an adequate remedy at law in the pending law suits, and it may show, if it can, that it is not indebted to the appellants on the notes. Where a court of law can do complete justice, a court of chancery cannot be resorted to to restrain the prosecution of such suit.

For the reasons indicated the injunctional order of June 16, 1931, will be reversed.

REVERSED.

Gridley, P. J., and Scanlan, J., concur.

will assume jurisdiction to avoid a multiplicity of suits, the complaining party must first establish his relation to the. (Imperial Fire Ins. Co. v. Coombes, 22 Ill. 333; Hoyt v. Aetna Cas. Co., 210 Ill. 464.)

It is also to be noted that the two essential averments in the bill assuming fraud and conspiracy in general terms, are upon information and belief. To warrant the issuance of a temporary injunction, upon the allegations of the bill, the essential averments must be verified and such verification must be positive and not on information and belief. (Sawyer v. Hoffman, 130 Ill. 239, 249, and cases cited.)

Under the circumstances in the instant case of a case by the bill and cross-bill, we are of the opinion that no equitable defenses are shown which cannot be availed of in the law actions and that the remedies are adequate and fully at hand in the pending law suits, and it is so ordered. If, of course, that is not intended to the appellants on the cross. While a court of law can do complete justice, a court of chancery cannot be resorted to to restrain the prosecution of such suits.

For the reasons indicated the interlocutory order of June 16, 1923, will be reversed.

Reversed.

Grigby, P. J., and Scanlan, J., concur.

35610

AL HOLTZ,
(Complainant) Appellee,

vs.

MORRIS ISAACSON et al.,
Defendants.

MORRIS ISAACSON,
Appellant.

INTERLOCUTORY APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

263 I.A. 349

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

By this appeal Morris Isaacson seeks to reverse an interlocutory order appointing a receiver, entered in a foreclosure proceeding. The complainant has not appeared or filed a brief in this court, in defense of the order.

Complainant's bill was filed August 4, 1931, and prayed for the foreclosure of a trust deed securing the principal sum of $33,000 and for the appointment of a receiver pendente lite. On August 3, 1931, before the bill was filed, a notice was served on Morris Isaacson that on August 4, 1931, complainant would move the court for such an appointment. On August 4, 1931, there was a hearing on the motion, based solely on the allegation of complainant's verified bill, resulting in the court entering an order appointing Logan L. Mullins receiver of the premises described in the bill of complaint, and the rents, issues and profits, upon the complainant filing a bond as required by statute in the sum of $2,000 within five days. On August 7 a complainant's bond in the sum of $500 was filed and approved by the court.

The material allegations of the bill are, that on July 28, 1926, Bernard Edidin and Annie Edidin, his wife, executed their 66 bonds, numbered 1 to 66, both inclusive, aggregating $33,000 and secured their payment by the execution of a trust deed to the Home Bank and Trust Company as trustee, upon certain real

[illegible]

IN RE:

(Consolidation [illegible]

vs.

MORRIS [illegible] et al.,

Defendants.

MORRIS ISLAND [illegible],

Appellant.

[illegible]

[illegible] Defendants

[illegible] interlocutory order [illegible] proceeding. [illegible] this court, in defense of the motion.

[illegible] for the condemnation of a [illegible] property [illegible] $34,000 was for the [illegible] August 3, 1973, [illegible] Morris Island on August [illegible], 1973, [illegible] court [illegible] hearing [illegible] and's verbal [illegible] publishing [illegible] the bill of [illegible], and [illegible] complaint filing [illegible] $2,000 [illegible] an amount [illegible] of $3 [illegible]

The material [illegible] July 25, 1973, [illegible] their [illegible] Island I [illegible] $34,000 and [illegible] to the [illegible]

estate in Chicago, in which trust deed the grantors assigned the rents, issues and profits of said real estate; that all of said bonds matured on August 2, 1931; that complainant is the owner of bond No. 28 for $500; that said bond and the interest thereon have not been paid; that all of the bonds secured by the trust deed have matured and have not been paid and complainant has declared all of said bonds immediately due and payable; that the general property tax for the year 1929, amounting to $625, became due and payable on May 15, 1931, and has not been paid; that the premises are improved with an apartment building containing six apartments; that the said apartments are not reasonably worth more than $22,500; that the present owner of the equity of redemption has suffered waste to be committed thereon and has allowed the same to be greatly out of repair and as a consequence the premises have become and are scant security for the payment of the indebtedness; that the makers of the bonds are, as complainant is informed and believes, insolvent, and unable to satisfy any deficiency decree that might be entered; that Morris Isaacson is the present owner of the equity of redemption. By the bill the owners of bonds numbered 29 to 66, both inclusive, totaling $32,500, are made defendants by the name and description of unknown owners. The bill further alleges that the Maidins by their trust deed agreed to keep the premises in good repair; not permit them to be sold or forfeited for any tax, and the bill concluded with a verification that the complainant has read the bill by him subscribed and knows the contents thereof, and that the matters therein alleged are true in substance and in fact, except such matters as are stated therein to be on information and belief, and as to such matters he believes them to be true.

On August 19, 1931, appellant filed his appearance in the cause and on August 21 moved the court to remove the receiver and now contends that the court erred in not sustaining this

[illegible]

motion. It appears from the order appointing the receiver that the complainant was ordered to file a bond as required by statute (Ch. 22, Par. 55, Cahill's R. S. 1931, page 245) in the sum of $2,000 within five days. The bond required by the statute and ordered to be filed by the complainant was never filed or approved and the court should have sustained appellant's motion.

A number of other grounds are urged for the reversal of the order. It will not be necessary to discuss all of them. It has repeatedly been held that a receiver pendente lite will not be appointed at the instance of a mortgagee, unless it appears that the premises are inadequate security and that it is not inequitable to make the appointment. (Strauss v. Georgian Bldg. Corp., 261 Ill. App. 284, 288, and cases cited.) The bill alleges that the premises are improved with an apartment building containing six apartments, and that said apartments are not reasonably worth more than $22,500, that the present owner of the equity of redemption has suffered waste to be committed thereon, and as a consequence the said premises have become and are scant and meager security for the payment of the indebtedness secured by the trust deed. There are no other allegations in the bill as to the value of the property. Whether the complainant has considered the value of the land as distinguished from the apartments, does not appear. The allegations that the present owner has suffered waste to be committed and has allowed the premises to be greatly out of repair, are but legal conclusions of the pleader (Grabowski v. MacLaskey, 257 Ill. App. 484, 486). The allegations in the instant case are not sufficiently definite as to the inadequacy of the security, and under the circumstances it was highly inequitable to appoint a receiver.

For the reasons indicated the interlocutory order of August 4, 1931, appointing a receiver of the premises is reversed.

REVERSED.

Gridley, P. J., and Scanlan, J., concur.

motion. It appears from the order [illegible] the property of the complainant was ordered to file a [illegible] by motion (Ch. 26, Par. 26, Smith's R. S. 1949), [illegible] in the sum of $5,000 within five days. It [illegible] from the [illegible] ordered to be filed by the [illegible] motion and the court should have [illegible] motion.

A number of other [illegible] of the order. It will not be necessary to discuss all of them. It has repeatedly been held that a [illegible] injunction bond will be appointed at the instance of a [illegible], unless it appears that the premises are indigenous [illegible] equitable to make the [illegible]. (Johnson v. [illegible] Corp., 291 Ill. App. 584, 588, and cases cited.) The bill alleges that the pre [illegible] containing six [illegible], and that said [illegible] are not reasonably worth more than [illegible] equity, of redemption has [illegible] and as a consequence the said premises have become and are [illegible] and manger security for the payment of the indebtedness required by the trust deed. There are no [illegible] in the bill as to the value of the property. While [illegible] adopted the value of the land as [illegible] does not [illegible]. The allegations that the [illegible] ered waste to be committed [illegible] strictly out of [illegible], are but legal [illegible] (Grabowski v. Bachmeier, 387 Ill. App. 183, 188). [illegible] in the instant case are not sufficiently [illegible] [illegible] of the security, and under the [illegible] inequitable to appoint a receiver.

[illegible] 4, 1951, appointing a receiver of the premises is reversed. [illegible] for the reasons indicated the interim order [illegible] REVERSED.

Griffin, P. J., and [illegible], J., [illegible].

34910

THE METROPOLITAN COMMUNITY CENTER, THE PEOPLES CHURCH, a religious Corporation, Appellant,

v.

HARVEY A. WATKINS et al., Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

263 I.A. 650

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The complainant, The Metropolitan Community Center, The Peoples Church, a religious corporation, filed its bill against Alexander Flower, Samuel F. Flower, Frank Flower, Edward Kallish, Harvey A. Watkins and The Bankers State Bank, a corporation, defendants, by which it seeks to have a certain contract or agreement with the defendant Edward Kallish, a second mortgage against certain property which the complainant purchased from the First Presbyterian Church and which was given to secure the payment of an installment note for $28,000, and a promissory note for $9,000 declared not to be the instruments of the complainant and that the same be cancelled and released. The bill also asks that an accounting be taken between the parties. The cause was referred to a master in chancery, who thereafter filed his report and a certificate of the evidence. The report found all the issues in favor of the defendants and recommended that the bill be dismissed for want of equity. The complainant's objections to the report were allowed to stand as exceptions and the record shows that after a hearing before the chancellor all of the exceptions were overruled. A decree was entered, from which the complainant has appealed. It appears, however, that one finding of the master was not con-

34030

THE [illegible]
COURTS, [illegible]
a railroad corporation.
[illegible]

HENRY [illegible]
[illegible]

Mr. [illegible]

The complainant, The [illegible] Company, [illegible]
The People Church, a religious [illegible] filed
against Jerusalem Place, [illegible], [illegible], [illegible]
Kellish, Harvey [illegible], [illegible] [illegible] a cor-
poration, [illegible], by [illegible] [illegible] in [illegible]
or agreement with the [illegible] [illegible], [illegible]
against certain property [illegible] the [illegible] [illegible] the
first [illegible] [illegible] [illegible] [illegible] [illegible]
of an injunction [illegible] [illegible] [illegible] [illegible] for
$9,000 [illegible] to be [illegible] [illegible] [illegible]
that [illegible] be [illegible] [illegible] [illegible] will also [illegible] [illegible]
an accounting be taken between the [illegible] [illegible]. The [illegible] [illegible] [illegible]
to a master in chancery, who thereafter [illegible] [illegible] report [illegible]
certificate of the evidence. The report found [illegible] [illegible] [illegible]
favor of the defendants [illegible] [illegible]. The bill [illegible] dismissed
for want of equity. The complainant's objections to the report
were allowed to stand as exceptions. [illegible] the [illegible] [illegible] [illegible]
a hearing before the chancellor [illegible] [illegible] [illegible] [illegible] [illegible]
a decree was entered, [illegible] the [illegible] [illegible] [illegible]
it appears, however, [illegible] [illegible] [illegible] [illegible] [illegible]

firmed. We will refer to this later in the opinion.

After a careful examination of the evidence we have reached the conclusion that the report of the master contains, in addition to his findings and recommendations, a fair and full statement of the evidence bearing upon the material issues in the case, and we have concluded that it will serve a useful purpose to incorporate in this opinion the full report made by him. The following is the report:

"The Bill of Complaint and the Amendment is predicated upon two theories:

"FIRST: That the various defendants conspired with Harvey A. Watkins, one of the Trustees of the Church, to obtain a larger sum of money from the complainant than the amount for which the First Presbyterian Church was willing to sell the Church property at 41st Street and South Parkway, with the intent to appropriate the excess to their own use, and thus deceive the complainant into believing that it was paying One Hundred Eighty-five Thousand Dollars ($185,000.00) for the Church property, whereas, in fact, the property was purchased thru the connivance of the defendants, for the sum of One Hundred Sixty-one Thousand Dollars ($161,000.00);

"SECOND: That the various notes and trust deeds executed by the Trustees were not authorized by the Church body.

* * *

"From all the evidence introduced as aforesaid, I make the following findings of fact: THAT -

"(1) At a meeting of the Board of Trustees of the Complainant on June 23, 1926, the Trustees resolved to enter negotiations for the First Presbyterian Church property and appointed Harvey A. Watkins to look after the financial prospects of disposing of the real estate then owned by Complainant. Upon defendant, Watkins's report that the Church was receiving bids for said property, the Trustees at their meeting of October 12th, 1926, instructed that a bid of One Hundred Fifty Thousand Dollars ($150,000.00) be submitted. On October 13, 1926, defendant, Alexander Flower, addressed a letter to Fred A. Poor offering One Hundred Fifty Thousand Dollars ($150,000.00); $25,000.00 of which was to be a cash payment. On October 15th, the Trustee Board appointed defendant Watkins, Chairman of the Committee to see after financing and purchasing of Church. On October 16, 1926, defendant Watkins addressed a letter to Maxwell A. Green on behalf of the Church, containing the same offer. On October 22nd Alexander Flower wrote to D. M. Compton, asking for an appointment to discuss the purchase. At the meeting of the Board of Trustees

on November 1st a resolution was passed that the offer be increased to One Hundred Seventy-five Thousand Dollars ($175,000.00) and that the offer be submitted through the Roosevelt Bank, at which time defendant Watkins proposes that the matter be dropped unless this offer be accepted. On November 2nd, 1926, Alexander Flower, on behalf of the Complainant addressed a letter to Mr. Compton, offering One Hundred Fifty Thousand Dollars ($150,000.00); Twenty-five Thousand Dollars ($25,000.00) cash.

"(2) On November 22nd, at a meeting of the Trustee Board, defendant Watkins reported that defendant Flowers had informed him that it would take One Hundred Eighty-five Thousand Dollars ($185,000.00) to make a deal, but that he thought One Hundred Seventy-five Thousand Dollars ($175,000.00) was high enough. On November 20th, 1926, Alexander Flower in behalf of Complainant, offered One Hundred Sixty Thousand Dollars ($160,000.00; Fifty Thousand Dollars ($50,000.00) cash.

"(3) At a meeting of the Church body held November 29th, 1926, a resolution was passed authorizing the purchase of the Presbyterian Church for the sum of, not to exceed One Hundred Eighty-five Thousand Dollars ($185,000.00) and authorizing the Board of Directors to expend not to exceed said sum in the execution of said resolution and authorizing the Board of Directors to re-finance the properties of Complainant and to use said sums so derived toward the execution of the premises. At the same meeting a resolution was passed in exactly the same language authorizing the expenditure of not to exceed One Hundred Sixty-one Thousand Dollars ($161,000.) for the purchase of said premises. The first resolution was delivered to defendants Flower and Kallish; the second to the First Presbyterian Church. At a meeting of the Trustees held on December 7th, 1926, both of these resolutions were submitted to the Trustee Board by Alonzo Tansil, attorney for the Church, together with a contract drawn up by him and the seller's attorneys for the purchase of the Church and recorded in the minutes of that meeting. On December 13th, 1926, a Contract was entered into between the complainant and the First Presbyterian Church, whereby the complainant agreed to purchase the Church for One Hundred Sixty-one Thousand Dollars ($161,000.00), Fifty Thousand Dollars ($50,000.00) in cash and the balance by giving purchase money mortgages aggregating One Hundred One Thousand Dollars ($101,000.00).

"(4) The contract was signed at the Banker's State Bank in the presence of Dr. Cook, Pastor and Chairman of the Board of Trustees of the complainant, Mr. Morsell, Treasurer of the complainant, defendants Watkins, The Flowers, Mr. Tansil, attorney for the Church, one or two others of the Trustees of the complainant, Mr. Milton Hart, representing the Flowers, and Messrs. Compton, McWilliams, Green, Dow and Dr. Boddy of the Presbyterian Church. The contract was signed by Dr. W. D. Cook, President and Edward W. Murray, Secretary of the Complainant. The contract states that the seller should not pay any commission for the sale of the premises and it was understood between defendant Flowers, and the Presbyterian Church that he would not charge the sellers a real estate broker's commission for the sale of the premises to the complainant.

[illegible]

"(2) [illegible] Board, [illegible] informed [illegible] dollars [illegible] hundred [illegible] enough. [illegible] Complainant, [illegible] Fifty Thousand [illegible] ($25,000.00) [illegible].

"(3) [illegible] 1926, a resolution [illegible] Presbyterian church [illegible] Liberty-Five Thousand [illegible] Board of Directors to [illegible] of said resolution [illegible] finance the properties of [illegible] derived towards the erection of [illegible] a resolution [illegible] the expenditure of not to exceed [illegible] Dollars ($[illegible]) for the [illegible] resolution [illegible] second to the first [illegible] Trustees held on [illegible] submitted to the Trustees [illegible] church, together with [illegible] authority for the [illegible] minutes of said meeting. [illegible] entered into between the [illegible] Church, whereby the complainant [illegible] One Hundred Sixty-one Thousand [illegible] dollars ($[illegible]) in [illegible] money mortgages [illegible] ($101,000.00).

"(4) The [illegible] in the presence of [illegible] Trustees of the complainant, [illegible] planning, [illegible] for the church, one of two stores [illegible] complainant, [illegible] Moore, Compton, [illegible] Presbyterian Church. [illegible] Trustees, and [illegible] the contract [illegible] for the purchase [illegible] Flowers, and the Presbyterian Church [illegible] dollars [illegible] premises to the complainant.

"(5) At the time this contract was signed and a deposit of Five Thousand Dollars ($5,000.00) earnest money given, it was necessary for the complainant to borrow Two Thousand Five Hundred Dollars ($2,500.00) of this deposit from the Roosevelt State Bank (one of the Flowers Banks). It was not until April, 1927, that the complainant raised an additional Fifteen Thousand Dollars ($15,000.00) on account of the original payment of Fifty Thousand Dollars ($50,000.00).

"(6) On the 11th day of December, 1926, the complainant, through its President, Pastor and Secretary, entered into an agreement with defendant, Edward Kallish, agreeing to pay him the sum of Twenty-four Thousand Dollars ($24,000.00) for his services in securing the Church premises and in financing the Church properties and raising Thirty Thousand Dollars ($30,000.00) to be used as part of the cash payment to be made to the Presbyterian Church.

"(7) On June 24, 1927, the defendants Flowers paid the balance of Thirty Thousand Dollars ($30,000.00) to the First Presbyterian Church, Attorney Tansil conducted all the legal details of the transaction, made the Twenty Thousand Dollar ($20,000.00) payments in installments and secured extensions for the completion of the contract.

"(8) At the meeting of the Church body on November 29th, 1926, a resolution was passed by the members of the Church authorizing the execution of a Twenty-two Thousand Five Hundred Dollar ($22,500.00) bond issue on the premises known as 3118-22 Giles Avenue, and a second Trust deed in the sum of Twenty-two Thousand Five Hundred Dollars ($22,500.00) on the same premises; another resolution authorizing the Trustees to execute a First Trust Deed in the sum of Seven Thousand Dollars ($7,000.00) and a second Trust Deed in the sum of Five Thousand Dollars ($5,000.00) on the unencumbered property located at 39th Street and Vernon Avenue and another resolution authorizing the Trustees to execute three Trust Deeds on the premises to be purchased from the First Presbyterian Church, one in the sum of Twenty-eight Thousand Dollars ($28,000.00); one in the sum of Three Thousand Five Hundred Dollars ($3,500.00) and one in the sum of Three Thousand Dollars ($3,000.00). The first two of these resolutions were introduced in evidence by the complainants and the third by defendants. All these resolutions were delivered to the Chicago Title and Trust Company and were attested by Edward W. Murray, Secretary in charge of the records and books of the Church and acknowledged by a Notary Public.

"(9) A few days after the execution of the contract, the complainant moved into and occupied the premises owned by the Presbyterian Church and has occupied the said premises ever since. Pursuant to the terms of the agreement between defendant Kallish and the Church, and in accordance with the authority of the resolutions passed by the members of the Church November 29, 1926, the following Trust Deeds were executed:

1 - Complainants' Exhibit 19 - Trust Deed in the sum of $22,500.00, dated February 24, 1927, recorded as Document 9641563.

"(5) At the time this conference was held, [illegible] of five thousand dollars ([illegible]) to meet every [illegible], it was necessary for the complainant, in order to [illegible] dollars ([illegible]) of this legacy, to borrow the [illegible] (one of the lessees herein). [illegible] the [illegible] the obligations raised on activities [illegible] Church, [illegible] ([illegible]) on account of his actual [illegible] of fifty thousand dollars ([illegible]).

"(6) On the 11th day of [illegible], 1970, the complainant, through his president, Walter [illegible], entered into an agreement with defendants, [illegible], by which, in the sum of twenty-four thousand dollars ([illegible]), the [illegible] in securing the church premises and in [illegible] the church properties and retain, fifty thousand dollars ([illegible]) to be used as part of the cash payment to be made [illegible] Church.

"(7) On June 24, 1970, the [illegible] paid the balance of fifty thousand dollars ([illegible]) to the Saint Presbyterian Church. Attorney Paul H. [illegible] all the legal details of the transaction, made the [illegible] dollar ([illegible]) payment in installments [illegible] the completion of the contract.

"(8) At the meeting of the church body in November 1969, a resolution was passed by the members of the church authorizing the purchase of a [illegible] dollar ([illegible]) home on the property known as 6113-21 Olive Avenue, and a second [illegible] in the name of Twenty-five Thousand Five hundred dollars ([illegible]) on the same property another resolution authorizing the [illegible] a first Trust Deed in the sum of Seven Thousand dollars ([illegible]) and a second Trust Deed in the sum of Five Thousand dollars ([illegible]) on the mentioned property, hereby known as [illegible] Avenue and another resolution authorizing [illegible] three Trust Deeds on the property to be purchased from the First Presbyterian Church, one in the sum of Twenty-[illegible] dollars ([illegible]), one in the sum of [illegible] Five Hundred Dollars ([illegible]), and one in the sum of [illegible] Dollars ([illegible]). The [illegible] resolutions were introduced in evidence by the complainant [illegible] by witnesses and [illegible]. All these resolutions were [illegible] Title and Trust Company and were [illegible] by [illegible], notary in the [illegible] of the records and books of [illegible] by a Notary Public.

"(9) Few days after the execution of the contract, the complainant moved into and occupied the premises owned by the Presbyterian Church and has occupied the premises ever since. Pursuant to the terms of the agreement between [illegible] and the church, and in accordance [illegible] of the resolutions passed by the members of the church, [illegible], the following [illegible] Trust Deeds were executed:

1 - Conditional Sales Contract - for [illegible] in the sum of [illegible], dated [illegible] 26, 1970, [illegible] document [illegible].

2 - Complainants' Exhibit 20 - Trust Deed in the sum of $3,500.00, dated February 24, 1927, recorded in Book 23758, Page 576 as Document 9600376 and re-recorded in Book 24607, Page 131 as Document 9641202.

3 - Complainants' Exhibit 21 - Trust Deed in the sum of $5,000.00, dated February 24th, 1927 and recorded as Document 9640986.

4 - Complainants' Exhibit 22 - Trust Deed in the sum of $7,000.00 dated February 24, 1927 and recorded as Document 9640985.

5 - Complainants' Exhibit 23 - Trust Deed in the sum of $3,000.00, dated February 24th, 1927, recorded in Book 23758, Page 580 as Document 9600377.

6 - Complainants' Exhibit 24 - Trust Deed in the sum of $28,000.00, dated February 24th, 1927, and recorded in Book 23758, Page 572, re-recorded in Book 24607, Page 127, as Document 9641201.

7 - - Trust Deed in the sum of $22,500.00, dated February 24th, 1927, recorded in Book 23766, Page 565, as Document 9605206.

"Trust Deeds herein numbered one (1) and three (3) having been given as collateral security for a note of complainant of even date therewith in the sum of Nine Thousand ($9,000.00); all duly executed by the ten duly and regularly qualified Trustees of the Church. These Trust Deeds were submitted to the various Trustees by Dr. Cook or Mr. Watkins and were signed upon the approval and advice of Alonzo Fansil, Attorney for the Church. The proceeds thereof were utilized as follows:

A - In paying the sum of $30,000.00 to the Presbyterian Church as part of the cash payment therefor;

B - In paying and satisfying a first mortgage on the premises described as the Giles Avenue Property, together with tax sales and other charges;

C - $24,000.00 to defendant Kallish, pursuant to the terms of his agreement with the complainant, dated December 11, 1926, and

D - The balance expended for other legal charges in connection with the negotiations of said Trust Deeds.

On the 24th day of June, 1927, the complainant delivered to defendant Kallish two checks aggregating $2,079.51 in payment for past due interest, recording, title changes, certification of bonds, etc., advanced for the complainant by the defendant Kallish, in placing the various loans upon the Church premises.

"(10) Early in December, 1926, complainant entered into possession of the premises purchased from the First Presbyterian Church and has occupied said Church since said date, and has received the benefits of the use and occupation thereof. Commencing on the

26th day of July, 1927, to and including April 3rd, 1929, complainant had made the monthly payments of principal and interest on the various obligations signed by its Trustees in accordance with the terms thereof, as follows:

Note and Trust Deed of $28,000.00 - $9,500.00 principal, $2,604.45 interest;

Note and Trust Deed of $3,500.00 - $1,425.00 principal, $312.13 interest;

Note and Trust deed of $3,000.00 - $1,425 principal, $257.26 interest;

Note and Trust Deed of $22,500.00 - no principal $2,362.50 interest;

Note and Trust Deed of $7,000.00 - no principal $326.67 interest;

Note and Trust Deed of $9,000.00 - no principal, $376.03 interest;

said aggregate amounts representing the installments of principal and interest payable on said Trust Deed and Notes from July 24, 1927 to January 24, 1929, both inclusive. These payments were made monthly by checks executed by Mr. Morsell, Treasurer of complainant and as he testified, every check was authorized by the proper authorities of the Metropolitan Community Center.

"(11) On the 9th day of May, 1929, being then in default in the payment of installments of principal and interest on their various obligations for the months of February, March, and April, 1929, William B. Cook, Director and Chairman of the Trustee Board and William A. Winston, Secretary of the Trustee Board, addressed a letter to the defendants, Flower Brothers, stating that the complainant was hard pressed for funds to meet the obligations held by Flower Brothers, as well as the obligations to the First Presbyterian Church, and asking the indulgence of defendants for a few days.

"(12) Although certain testimony was stricken from the records, relating to the conversations with the defendant Harvey A. Watkins, outside of the presence of the other defendants, I have yet considered all this evidence, for the purposes of this report. I find that there is no evidence of conspiracy between the defendants or fraud on the part of any or either of them. The letters addressed to the representatives of the First Presbyterian Church by defendants Watkins and Flowers, as well as the other negotiations for the purchase of the property, evidence an intent on their part to secure the purchase of the Church property at as cheap a price as possible. There was no attempt on their part in their negotiations with the Presbyterian Church to concealthe name of the purchaser; and no attempt to hide the name of the seller from the complainant. Complainant and its members had the opportunity to apprise itself of the terms of the sale and the purchase price.

"(13) The contract for the purchase of the premises was in the name of the complainant, was prepared by its attorney and was signed by its duly authorized officers. The actual purchase price was stated in this contract, to-wit, One Hundred Sixty-one Thousand Dollars ($161,000.00) and there is no evidence in the

[illegible] day of [illegible], 1927, [illegible] plaintiff [illegible] made the merchandise [illegible] on the various [illegible] with the bona [illegible]

[illegible] - [illegible] 3,[illegible] interest;

[illegible] - [illegible] 3,[illegible] interest;

[illegible] - [illegible] 1927, [illegible] interest;

[illegible] - no [illegible] 3,[illegible] interest;

[illegible] - no [illegible] 3,[illegible] interest;

[illegible] - no [illegible] 3,[illegible] interest;

and [illegible] amounts [illegible] and interest [illegible] payable on [illegible] 1927 to [illegible] made [illegible] [illegible] [illegible] the proper [illegible]

"(II) In the [illegible] in the payment of [illegible] various obligations [illegible] 1929, [illegible] and [illegible] a letter to the [illegible] plaintiff [illegible] Flower [illegible] Church, and [illegible]

"(III) Although certain [illegible] records, relating to the [illegible] Walkins, outside of the [illegible] considered all this [illegible] find that there is no [illegible] or fraud on the part of any [illegible] to the representatives of the [illegible] Walkins and Flower, as well [illegible] change of the property, [illegible] the purchase of the Church property [illegible] There was no attempt on their part [illegible] Presbyterian Church to consolidate [illegible] attempt to [illegible] plaintiff and its members [illegible] the terms of the sale and the purchase price.

"(IV) The counsel of [illegible] in the name of the complainant, [illegible] was also [illegible] prior [illegible] Thompson [illegible]

record that the defendants attempted to deceive complainant into believing that complainant was paying One Hundred Eighty-five Thousand Dollars ($185,000.00) for the premises.

"(14) The minutes of the meeting of the Trustee Board contain a statement by defendant Watkins, that the Flowers had informed him it would take One Hundred Eighty-five Thousand Dollars ($185,000.00) to make the deal, but that he felt that One Hundred Seventy-five Thousand Dollars ($175,000.00) was sufficiently high. The witnesses for Complainant, officers, Trustees and members, testified that they were satisfied to expend One Hundred Eighty-five Thousand Dollars ($185,000.00) in the purchase of the Church, including financing the Church properties. They testified that they realized it would be necessary to obtain a loan of Thirty Thousand Dollars ($30,000.00) to make their cash payment on the Church and that it would be necessary to make a loan to take up the past due first mortgage on the property then owned by the complainant.

"(15) The evidence discloses that at the meeting of the Church members on November 29th, 1926, the members were advised that the premises could be secured for One Hundred Sixty-one Thousand Dollars ($161,000.00). The resolutions of the Trustee Board from June to December, 1926, evidence the fact that the complainant knew that it would be necessary to obtain someone to re-finance the Church properties for the purpose of securing sufficient sums to make the necessary cash payment for the Presbyterian Church and to pay off existing encumbrances on the premises then owned by complainant. Complainant was negotiating with Jesse Binga for obtaining financial assistance and was negotiating with these defendants at the same time and the additional fact that the financing and negotiations for the purchase of the new Church were conducted by the defendants with complainant's consent, clearly shows that complainant was satisfied with the terms for refinancing submitted by defendants.

"(16) The aforesaid conclusion is also to be drawn from the fact that at the meeting of the members of the Church held November 29th, 1926, two sets of resolutions were passed in identical language, authorizing the Board of Trustees to refinance the Church properties and to use said sums so derived in the purchase of the Presbyterian Church property. The only difference in these resolutions was that one authorized the expenditure of One Hundred Sixty-one Thousand Dollars ($161,000.00) and the other the expenditure of One Hundred Eighty-five Thousand Dollars ($185,000.00), the first of which was delivered to the First Presbyterian Church, and the second to the defendants.

"(17) At the Trustee's meeting of December 7th, 1926, the fact that these two resolutions had been passed and certificates thereof issued, was brought to the attention of the Trustee Board and entered of record in the minutes of the meeting. It is evident from these resolutions that Complainant, at all times, knew that they were paying One Hundred Sixty-one Thousand Dollars ($161,000.00) to the Presbyterian Church, and the excess disclosed in the resolutions calling for the expenditure of One Hundred Eighty-five Thousand Dollars ($185,000.00) was for the payment of the costs of raising the additional sum of Thirty Thousand Dollars ($30,000.00) payment of the past due first mortgage of Fifteen Thousand Dollars ($15,000.00) and other expenses of refinancing the Church properties.

"(18) I THEREFORE FIND, that W. D. Cook and Edward W. Murray, as Chairman and Secretary, respectively, of the Complainant were authorized to enter into the agreement of December 11th, 1926, with defendant Edward Kallish, in behalf of the Complainant for the financing necessary for the purchase of the First Presbyterian Church property, and in so doing carried out the intention of the Church members under their resolutions of November 29th, 1926, as well as the intention of the Trustees, as indicated in the minutes of their meetings introduced in evidence by Complainant.

"(19) The evidence shows that the Complainants entered into possession of the premises purchased by them from the First Presbyterian Church in December, 1926; that they have continued to occupy said premises since said date; that the defendants were instrumental in securing said property for complainants by means of their negotiations, by reason of their refinancing the premises owned by the complainant and by securing for complainant a loan of Thirty Thousand dollars ($30,000.00) for the purpose of making the initial payment on said premises; that the complainant obtained the benefit of the Trust Deeds and Notes executed by complainant's Trustees and that the complainants, from the 26th day of July, 1927 until April 3, 1929, made the payments required to be paid on the said Trust Deeds and Notes, with knowledge of the Church members and the Trustees, without protest.

"(20) I THEREFORE FIND, that in addition to the express authority given by the members of the complainant to the officers and Trustees of the complainant to execute the contract of December 11th, 1926, between complainant and defendant Edward Kallish, and to execute the Trust Deeds and Notes signed by all the Trustees of the Complainant, the Complainant, by its conduct in accepting the benefits of its contract, by occupying the premises purchased by it through the services of defendants and obtaining the benefits of the use and possession thereof and by meeting the payments of the installments of principal and interest required of it under the Trust Deeds signed by its Trustees without protest, has ratified the action of its Officers and Trustees in the execution of the contract of December 11th, 1926, by its Officers, and the Trust Deeds and Notes hereinabove described, executed by its Trustees, and the Complainant is estopped from denying that it authorized the execution of these instruments by its Officers and Trustees;

"(21) AND I FURTHER FIND, that the Trust Deeds and Notes hereinabove more fully described, executed by all of the Trustees of the complainant, were expressly authorized by the resolutions of the members of the complainant (complainant's Exhibits '17' and '18' and Defendant's Exhibit '1') at a meeting of the members of the complainant regularly called, according to law, a quorum of the members being present entitled to vote as required by the by-laws of the complainant corporation, and which resolutions were reduced to writing by the secretary of the Church under the seal of complainant corporation and delivered to the Chicago Title & Trust Company, and that the said Trust Deeds and Notes hereinabove described, are good, valid, binding and subsisting liens upon the premises therein described.

"(16) [illegible]

Surrey, in Chertsey and [illegible] were authorised to enter into the [illegible] with [illegible] the finishing [illegible] Chertsey property, and in [illegible] Chertsey [illegible] well as the transition of the [illegible] of their [illegible] instructions [illegible]

"(17) The [illegible] late possession of the [illegible] Presbyterian church in [illegible] 1788) [illegible] [illegible] assumed in [illegible] their [illegible] owned by the complainant and [illegible] Thirty Years [illegible] initial payment on [illegible] benefit of the trust [illegible] Trustees and that the [illegible] until April 1, 1858, [illegible] said Trust [illegible] and the Trustees, without protest.

"(18) [illegible] accordingly given by the [illegible] and Trustees of the complainant [illegible] lish, 1858, [illegible] to execute the [illegible] the complainant, [illegible] benefits of its [illegible] through the [illegible] use and possession thereof [illegible] instalments of principal and [illegible] Trust [illegible] by the Trustees [illegible] the action of the [illegible] trust of December 31st, 1888, [illegible] and Notes [illegible] Complainant is [illegible] of these instruments by the [illegible]

"(19) [illegible] hereinbefore [illegible] of the complainant, [illegible] the complaint [illegible] and Exhibit "J") [illegible] complainant [illegible] members being [illegible] the complainant corporation also, [illegible] writing of the [illegible] corporation and delivered to the [illegible] that the said Trust Funds and Notes [illegible] said, [illegible] described.

"(22) The complainant, by argument, is attempting to prove the disproportion existing between the amount of money advanced at any time by the defendant bankers, and the amount of Twenty-four Thousand dollars ($24,000.00) which they paid for financing the loan. In reply to this suggestion, I report that the conduct of the defendants after the execution of the contract, forms no basis for equitable consideration and that this Court cannot make a new contract in the place and stead of one freely and openly entered into.

"(23) For these reasons, I recommend that the complainant's bill be dismissed for want of equity."

After hearing arguments on the exceptions to the master's report the court entered a decree approving and confirming the report of the master in all particulars save one, wherein the court found as follows:

"The Court finds, however, there is no evidence in the record that the Trustees of the Complainant Church were authorized to execute the collateral Note in the sum of Nine Thousand Dollars, ($9,000.00) secured by Trust Deeds in the sum of Twenty-two Thousand Five Hundred ($22,500.00) Dollars dated February 24th, 1927, recorded as Document No. 9641563 and Trust Deed in the sum of Five Thousand ($5,000.00) Dollars dated February 24th, 1927, recorded as Document No. 9640986. The Court, therefore, finds that the said collateral note was executed without the authority of the Complainant, and orders that the said Note and the collateral secured thereby or so much thereof as has not been delivered to the Complainant, be delivered by the defendants herein to the Complainant and cancelled."

The complainant is satisfied with this part of the decree, and, as no cross-error is assigned by the defendants, it is unnecessary for us to pass upon the action of the chancellor in that regard.

The complainant contends that "the Court erred in finding that the trustees of complainant were authorized to enter into contract with Edward Kallish or any contract. The trustees of a religious corporation have the care, custody and control of the real and personal property of such corporation, subject to the direction of the congregation, and can only sell, mortgage or convey the same or enter into lawful contracts in its name and in its behalf when authorized and directed by the congregation. Paragraph 173 Chapter 32 Cahill's Revised Statutes of Illinois; St. Mary's A. M. E. Church v. The German Lutheran Church, 167 Ill. App. 309; Zion

"(3). [illegible] to prove the [illegible] before the amount of money advanced [illegible] by the [illegible] Bank, the amount of Twenty-four Thousand dollars ($24,000.00) which [illegible] for financing the loan. [illegible] the [illegible] the [illegible] force no [illegible] in [illegible] and [illegible] and [illegible] and speedy [illegible] into.

"(4). [illegible] I recommend [illegible] the complaint's will be dismissed [illegible]."

After hearing argument on the exceptions to the master's report the court entered a decree sustaining and confirming the report of the master in all particulars save one, adopting the court's [illegible] as follows:

"The Court finds, however, that [illegible] in the evidence in the record that the Trustees of the Complainant Church were authorized to execute the collateral Note in [illegible] Three Thousand Dollars, ($3,000.00) borrowed by Trust [illegible] in the sum of Twenty-two Thousand five hundred [illegible] Building Association dated [illegible] 1927, recorded in Document No. [illegible] and [illegible] in the sum of Five Thousand ($5,000.00) [illegible] 1927, recorded in Document No. [illegible] that the said collateral Note [illegible] authority of the "Capitalized", and [illegible] and the collateral mortgage thereto [illegible] to the Complainant, be delivered by the [illegible] Complainant and cancelled."

The complainant is satisfied with this part of the decree, and, as no cross-error is assigned by the defendant, it is unnecessary for us to pass upon the action of the chancellor in [illegible].

The complainant contends [illegible] in finding that the trustees of complainant were [illegible] into contract with the Kellish or any contractor. The [illegible] of a religious corporation have the care, custody and control of the real and personal property of such a corporation, [illegible] the direction of the congregation, and are only [illegible] money the same or enter into legal contracts in its name and in its behalf when authorized [illegible] by the congregation. [illegible] 172 [illegible] 32 Cyclopedia [illegible] Church v. The German Lutheran Church [illegible] Ill. [illegible] 1[illegible] [illegible]

Church of Sterling v. Menach, 178 Ill. 230." We have heretofore quoted the finding of the master that bears upon this contention. The decree finds:

"That through the officers of the defendants, Flowers, the Complainant, through its President, Pastor and Secretary, on the 11th day of December, 1926, entered into a contract with Edward Kallish, in which he agreed to secure for the Complainant, a loan of Thirty Thousand ($30,000.00) dollars and further agreed to refinance the premises owned by Complainant and to pay the past due mortgage of Fifteen Thousand ($15,000.00) Dollars, interest, taxes and other charges, on the Giles Avenue property, then owned by the Complainant, in consideration for which services, together with the assistance to Complainant in securing the First Presbyterian Church property, Complainant agreed to pay the defendant, Edward Kallish, the sum of Twenty-four Thousand ($24,000.00) dollars; * * * that the President, Pastor and Secretary of the Complainant, were authorized to enter into said contract of December 11th, 1926, with the defendant, Edward Kallish, by a Resolution of the Members of the Complainant Corporation, at a meeting duly and regularly called for said purpose, on the 29th day of November, 1926, in accordance with its By-Laws and the Statutes of the State of Illinois, a quorum being present; that said Resolution was duly certified by the Secretary of the Complainant Corporation and delivered to the defendants, Flowers and Kallish and authorized the expenditure of the sum of One Hundred Eighty-Five Thousand ($185,000.00) Dollars for the purchase of said premises and in the refinancing of the property owned by the Complainant; * * * that said contract was authorized by the Resolutions of the Board of Trustees of Complainant."

After an examination of the evidence bearing on this contention, we are satisfied that the finding of the master and the finding of the decree were fully justified by the evidence. We are unable to see the application of the cases cited to the facts of the instant case. The first case merely holds that if the pastor of a church disburses its funds without authority the amount so disbursed may be recovered by the church, as parties receiving such money are bound to ascertain at their peril whether such pastor was authorized to disburse the same. In the second case the court, after stating the general rule that it was the duty of a mortgagee to see to it that the trustees executed the mortgage to her in pursuance of the direction to that effect, given to them by the congregation, further held that the following resolution adopted at a meeting of the

Church of Christian v. Meagher, 176 Ill. 264, [illegible] a have accepted the quoted the finding of the [illegible] that [illegible] the decree line:

"That through the activities of the defendants, [illegible] the Complainant, through its [illegible], [illegible] the 11th day of [illegible], 1926, [illegible] [illegible] secured Addition, in which [illegible] a loan of thirty thousand [illegible] to refinance the premises owned by [illegible] to pay the past due mortgage of fifteen thousand [illegible], [illegible], taxes and [illegible] one year, on the [illegible] by the Complainant, in consideration [illegible], [illegible] with his assistance in [illegible] Church property, [illegible] Addition, the sum of twenty-four [illegible] that the [illegible] authorized to enter into said contract [illegible] the defendant, [illegible] Complainant [illegible] said purpose, [illegible] its by-laws and the [illegible] being present, that said [illegible] secretary of the [illegible] defendants, [illegible] the sum of one hundred [illegible] for the purchase of said premises and in [illegible] property owned by the Complainant; [illegible] authorized by the [illegible] Complainant."

After an examination of the evidence [illegible], we are satisfied that the finding of the [illegible] of the decree was fully justified by the [illegible]. [illegible] to see the application of the [illegible] instant case. The first case [illegible] the power of a church disbursed the funds with [illegible] may be recovered by the church, [illegible] bound to account in an [illegible] to disburse the funds. In the present case [illegible] the general rule that it was the duty of a [illegible] that the trustees exercise the authority in her in [illegible] direction to [illegible], [illegible] Main v. the following [illegible] a meeting of the

congregation was sufficient authority to the trustee to make the mortgage in question (p. 232): "Resolved, that we authorize the board of trustees to make necessary loans for improvements, and give a mortgage on the church property as security." This case is an authority against the contention of the complainant that no resolution of the congregation, valid or invalid, "mentions anything at all about a contract with Edward Kallish," and, therefore, "the officers of the complainant were not authorized to enter into a contract with Kallish," as it will be noticed that the resolution in the last mentioned case, which the court held authorized a mortgage on the church property, did not name any person as the party from whom the money should be borrowed.

The complainant contends that no evidence was offered to show that the pastor, president and secretary of the complainant were authorized to enter into the contract with Kallish by a resolution of the members of the complainant corporation. The master and the chancellor found against this contention and we approve of their findings in that regard. The complainant cites, in support of this contention, St. Patrick's Roman Catholic Church v. Gavalon, 82 Ill. 170, and Chortal v. School Directors of Dist. No. 27, 255 Ill. App. 89. We are unable to see how these cases apply to the facts of the instant case. In the first case the court held that where the trustees of a church are authorized to execute contracts for a church, they should act as a body, or delegate the power to one of their number, or ratify and approve the act of one of their number acting for them, and unless they do so, the church, as a corporation, will not be bound, and that the unauthorized act of one of the trustees cannot bind the church as a corporation. The second case holds that an informal agreement by members of the board of directors of a school district who employ a person as teacher is not binding as a contract, as the statute provides that no official business shall be transacted

congregation [illegible] to [illegible] mortgages in question (p. 232). Therefore, [illegible] the board of trustees [illegible] and give a mortgage on the church property [illegible] case is an authority [illegible] that no violation of the [illegible] anything [illegible] about a contract [illegible] fore, "the officers of the congregation [illegible] into a contract with [illegible] tion in the last sentence [illegible] authorized a mortgage on a church property, [illegible] party from whom the money should be borrowed."

The legislature [illegible] show that the pastor, president [illegible] authorized to [illegible] the members of the congregation [illegible] chancellor found against the congregation [illegible] finding in [illegible] contention, [illegible] 170, and [illegible] 89. [illegible] instant case, [illegible] of a church [illegible] should not [illegible] or reality and [illegible] and unless they [illegible] bound, and [illegible] place the church [illegible] informal [illegible] district [illegible] as the statute provides [illegible]

by school directors except at a regular or special meeting.

Complainant next contends that the "defendants were bound to see and know that the president, pastor, and secretary were acting under proper authority from the church, and from the trustees." That we have heretofore said should be sufficient to dispose of this contention. The complainant cites Thomasson v. Grace M. E. Church, 113 Cal. 558, and People's Bank v. St. Anthony's Roman Catholic Church, 109 N. Y. 512. In the first case the court said: "Defendant did not approve the contract, for its first act in the premises as a corporation was to repudiate it. 'A voluntary acceptance of the benefits of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting.' (Civ. Code, sec. 1589; Borel v. Rollins, 30 Cal. 409; Gribble v. Columbus Brewing Co., 100 Cal. 67, and cases there cited.) But that doctrine has no application here, for the reason that the defendant neither received nor accepted any benefits from the transaction." (Italics ours.) In the second case it appeared that certain notes recited that they were given for a loan by the payee to such religious corporation, and on their face they purported to be obligations of the corporation, and were signed by its president, secretary and treasurer in their official characters. In the opinion the court states that "there is no proof of a corporate act, except by the declaration of the officers of the defendant on the face of the instruments, and there is no proof whatever that they were authorized either to make the notes or to make any representations binding upon the defendant. They assumed to act as agents, but the only proof of their agency to make the notes is their own declarations, and it is a familiar doctrine that an agency can neither be created nor proved by the acts or declarations of the assumed agent alone." The court further held that the trustees had "no separate or

by school teachers or by [illegible]

[illegible]

bound to see the [illegible]

were [illegible] and a proud [illegible]

students." [illegible]

dispose of this contention. [illegible]

Grace [illegible], Chicago, Ill. [illegible]

Human Liberty Bureau, 102 [illegible]

court said: "[illegible]

act in the practice as a corporation [illegible]

voluntary acceptance of the [illegible]

be a consent to all the [illegible]

facts to know, or could [illegible]

(Div. Court, 1.[illegible]

Columbus Railway Co., [illegible]

determine use of an [illegible]

neither receives nor [illegible]

(Italics ours.) "[illegible]

received that they were [illegible]

religious corporation, one [illegible]

obligations of the corporation. [illegible]

necessary and [illegible] in the [illegible]

the court [illegible]

by the constitution of the [illegible]

the instrumentes, [illegible]

authorities [illegible]

bearing upon the [illegible]

only proof of [illegible]

and it is [illegible]

nor proved [illegible]

The [illegible]

individual authority to bind the corporation, and this although the majority or the whole number, acting singly and not collectively as a board, should assent to the particular transaction." The court further stated: "It was not shown, as matter of fact, that they were issued in pursuance of any vote, action or resolution of the board of trustees, or that they were given for a corporate debt, or that the corporation received the benefit of the consideration, or, indeed, that any consideration existed." The question of consent and ratification enters into a determination of the instant case, but we shall refer to that question later.

The complainant next contends that "in determining whether an instrument is the corporate act of the congregation, the declaration of the officers of the church on the face of the instrument is not proof whatsoever that they were authorized either to execute the instrument or to make any representation binding upon the church." This principle of law may be conceded.

The complainant next contends that "the Court erred in finding that the trustees were authorized to make, execute and deliver the promissory note for $26,000.00 secured by trust deed on the First Presbyterian Church property." We are satisfied that the finding in question was fully justified by the evidence.

The complainant next contends that "the evidence shows that the supposed loan by Flower Brothers to complainant was really not a loan. The trustees of complainant executed and turned over notes and trust deeds aggregating $100,500.00 to Flower Brothers. Defendants Flower Brothers sold $73,000.00 worth of this paper and realized the full amount. It would be manifestly unequitable to permit these defendants, the Flower Brothers, to charge complainant $24,000.00 for securing for them on their paper $30,000.00. The charge itself would be unreasonable and unconscionable. The specific

individual authority to bind the corporation, one also although the majority of the whole number, acting single and as, collectively as a board, should commit to the corporation some claim." The court further stated: "It was not shown, as matter of fact, that they were issued in pursuance of any vote, action or resolution of the board of trustees, or that they were issued for a corporate purpose, or that the corporation received the benefit of the consideration, or, indeed, that any consideration existed." The question of consent and ratification where there is substantiation of the instant case, but we shall refer to that question later.

The complainant next contends that "in determining whether an instrument is the corporate act of the corporation, the designation of the officers of the church on the face of the instrument is not proof whatsoever that they were authorized either to execute the instrument or to make any representation binding upon the church." This principle of law may be conceded.

The complainant next contends that "the lower court in finding that the trustees were authorized to make, execute and deliver the promissory note for $ 3,000.00 secured by trust deed on the first mortgagation church property." We are satisfied that the finding in question was fully justified by the evidence.

The complainant next contends on "the evidence shows that the purported loan by Flower Brothers to complainant was really not a loan. The trustees of complainant borrowed and turned over money and trust deeds aggregating $100,000.00 to Flower Brothers. Defendants Flower Brothers held $75,000.00 worth of white paper and realized the full amount. It would be manifestly unjustifiable to permit these defendants, the Flower Brothers, to charge complainant $25,000.00 for securing for them on their paper $40,000.00. The charge itself would be unreasonable and unconscionable. The specific

performance of a contract will not be decreed unless the contract was made with perfect fairness and without misapprehension, misrepresentation or oppression. To entitle a party to such a decree the contract must be reasonable, fair and equitable." The law governing cases of specific performance as laid down in the authorities cited by the complainant in support of this contention is well settled, but we are unable to see how that rule of law applies to the instant case, as the complainant, in its bill, did not seek specific performance of the contract and the defendants filed no cross-bill seeking affirmative relief. The contract in question has been performed on both sides.

The complainant next contends that "the evidence shows that Flower Brothers were the agents of complainant in negotiating for the purchase of the First Presbyterian Church property, as well as its agent in securing a loan of $30,000.00 to apply on the down payment. * * * The Court will not allow such agent to misrepresent as to the price of the property that he was buying for his principal and retain the difference in price for his own benefit." We have cited the findings of the master bearing upon the instant contention. The decree finds:

> " * * * that there is no evidence in the record that the defendants, Flowers, Kallish, and the Bankers State Bank, or either or any of them conspired with the defendant, Harvey A. Atkins, to deceive complainant into believing that the premises owned by the First Presbyterian Church was being purchased by Complainant for the sum of One Hundred Eighty-five Thousand ($185,000.00) Dollars, with the intent to appropriate the excess over and above the actual purchase price, One Hundred Sixty-One Thousand ($161,000.00) Dollars to the use of the defendants, and thus defraud the Complainant of large sums of money. On the other hand, the Court finds that the defendants assisted the Complainant in its purchase of said premises, dealt fairly with it, attempted conscientiously to secure said premises for Complainant at the best possible price, and truthfully reported the results of their negotiations to Complainant; that they made no attempt to conceal the name of the purchaser or of the seller and that the contract of purchase was in the name of the Complainant, was prepared by its Attorneys, contained the actual purchase price of the property and was executed by the duly authorized Officers of the Complainant."

We concur in these findings.

The complainant contends that "the evidence shows that the complainant's trustees and members were misled as to the price of the First Presbyterian Church property. They understood they were paying $185,000.00 for the property. The evidence further shows that Alexander Flower declared that they were not charging the complainant church any commission for their services in purchasing the property and negotiating the loan. It would be manifestly unfair to allow them to charge and collect commission by any indirection." There is no merit in this contention. Like other contentions, it is based upon an assumption of facts not warranted by the evidence.

The complainant contends that the complainant's bill asks for an accounting and the court should have ordered one. As we read the record there is no necessity for an accounting. There is no dispute as to what securities the defendants received and what moneys were expended by them, nor is there any dispute as to the amounts paid by the complainant in principal and interest on the various obligations. The present contention would seem to be an afterthought.

In its brief the complainant contends that "the Court erred in finding that there was no evidence of conspiracy among the defendants," but in its argument it does not even refer to this contention. The bill contains numerous allegations which charge that Harvey A. Watkins, a trustee of the complainant corporation, conspired with certain of the other defendants to cheat and defraud the complainant. It is clear that the complainant, at the outset, regarded these allegations as of the very life of its case. The master, in his report, and the chancellor, in the decree, both found that there was no evidence to support these allegations, and we agree with their findings in that regard.

The defendants contend that even though the president, pastor and secretary of the complainant corporation lacked the

express authority to perform the acts in question, nevertheless, the complainant has ratified the said acts. In the master's report he finds the complainant has ratified the acts in question and he states the facts and circumstances upon which he bases the finding. The chancellor, in the decree, finds:

> " * * * that in addition to the authority given by the members of the Complainant by their resolutionsof November 29th, 1926, the Complainant by its conduct in occupying the premises purchased by it through the assistance of the defendants, and obtaining the benefits of the uses and possession thereof by accepting the loans made for it by defendants and utilizing the proceeds thereof in purchasing said premises and refinancing its other properties and by meeting without protest the payments of installments of principal and interest provided for in the Trust Deeds signed by all of its Trustees, has ratified the action of its Officers and Trustees in the execution of the contract of December 11th, 1926, and the Trust Deeds and Notes hereinabove described, and the Complainant is estopped from denying that it authorized the execution of said instruments by its officers and Trustees."

That a corporation organized for profit may ratify the unauthorized acts of its officers is not questioned by the complainant, but it contends that "trustees of a religious corporation, have the care, custody and control of the real and personal property of such corporation, subject to the direction of the congregation and can only sell, mortgage or convey the same or enter into lawful contracts in its name and in its behalf when authorized and directed by the congregation." The complainant argues that in order "to protect religious corporations from unauthorized and unlawful acts of its officers, which, if not checked might lead to the destruction of these worthy institutions," the ordinary rules of law relating to ratification do not apply to such corporations. We cannot agree with this contention. It will be noted that certain of the cases cited by the complainant in support of other contentions, and to which we have referred, recognize the rule that a religious corporation may ratify the unauthorized act of its officers. In Alton Manf. Co. v. Biblical Institute, 243 Ill. 298, the Institute was a charitable corporation,

express authority to perform the acts in question, or [illegible],
the complainant has verified the act. [illegible]
report be filed the complainant may [illegible] in question
and no stamps the face, the officer[illegible] upon which he marks the
finding. The commission, in its course, [illegible]

"[illegible] that in addition to the [illegible] given by the
members of the [illegible] by [illegible] complainant [illegible]
1926, the complainant by its counsel in [illegible] promises
purchased by it during a [illegible] period [illegible], and [illegible]
taining the details of the work and [illegible] by [illegible]
the loans made for it by [illegible], and [illegible] [illegible]
of in purchasing, [illegible] and refinancing its [illegible], properties
and by [illegible] without [illegible] or [illegible] or
principal and interest [illegible] by
all of the [illegible] and [illegible]
Trustees in the [illegible] of the [illegible] Club, 1926,
and the [illegible] and Hotel [illegible] and the [illegible] and the [illegible]
Complainant is [illegible] from [illegible] [illegible] the [illegible]
of said [illegible] by the [illegible]."

That a corporation organized for profit may [illegible] the administrative
acts of its officers is not [illegible] by [illegible], but it
contends that [illegible] corporation, [illegible] the [illegible]
custody and control of the full and [illegible] report [illegible] cor-
poration, subject to [illegible] of [illegible] corporation [illegible] only
well, mortgage or convey [illegible] or [illegible] property in
its name and in its behalf when [illegible] by the con-
troller." The complainant [illegible] an [illegible] practice
religious corporation [illegible] of its
officers, which, if not [illegible] by the [illegible] of these
worthy institutions," the [illegible] of [illegible] to [illegible]
cation do not apply to such corporations. [illegible] with this
contention. It will be noted in [illegible] of the [illegible] by the
complainant in [illegible] of other [illegible], [illegible]
[illegible], [illegible] the rule [illegible] religious corporations [illegible]
the unauthorized act of its officers. [illegible] v. [illegible] Building
Institute, 265 Ill. 283, the Institute [illegible] charitable corporation,

created primarily for educational purposes and the conduct and control of the corporation was placed in a board of trustees. In that case the court held (p. 303) that "The trustees having power to borrow money for proper corporate purposes and execute notes therefor, might exercise this authority in a number of ways: (1) They might appoint one of their number as agent of the corporation for that purpose and expressly or impliedly clothe him with authority to borrow money and give notes; (2) where no actual authority has been conferred upon the agent of the corporation to borrow money and give notes but where the agent has done so, and with full knowledge of all the facts the corporation has approved and ratified the acts of the agent, it will be liable to the same extent as if actual authority had been given to perform the acts; (3) where no authority had been given or existed in the agent to borrow money but where the corporation received the use and benefit of the money it will be liable; (4) by holding an agent out to the public as possessing authority to exercise the powers assumed by the agent and to do the acts performed by him, in which case the corporation would be bound to the extent of the agent's apparent authority." The plaintiff in that case sued to recover upon three promissory notes signed "Garrett Biblical Institute, by Robert D. Shepherd, treasurer." The defendant had contended, inter alia, that there was no evidence to show that Dr. Shepherd, treasurer of the corporation, had ever been given any authority by the trustees to borrow money and execute the notes of the corporation therefor. The trial court sustained the motion of the defendant to direct a verdict in its favor. The Supreme court held that "the evidence, we think, was sufficient to justify submitting to the jury the liability of appellee on three grounds: First, whether the money was borrowed by authority, express or implied, of the corporation; second, if not borrowed in pursuance of authority pre-

[illegible]

[illegible] (1) They might [illegible] use of their [illegible] of the corporation for that purpose [illegible] or legal. In [illegible] the [illegible] authority to borrow money [illegible] (2) [illegible] been conferred upon [illegible] the corporation to borrow money and give notes and [illegible] to secure [illegible] of all the [illegible] or the agent, in fact [illegible] authority had been given to [illegible] (3) [illegible] given or delivered in the name of the borrowing corporation received the [illegible] or [illegible] by holding an agent out to the public [illegible] authority to exercise the powers assumed by the agent [illegible] in which case the corporation might be [illegible] the act of the agent's apparent authority." The [illegible] cases to recover upon these preliminary [illegible] of first impression, by [illegible] "[illegible] contended, [illegible] the [illegible] by the [illegible] the [illegible] direct [illegible] in the [illegible] evidence. [illegible] the liability of [illegible] on [illegible] the [illegible] money [illegible] authority [illegible] for first [illegible] if not [illegible] in [illegible] authority [illegible]

viously given, did the corporation, after knowledge of the fact of its being borrowed, approve or ratify it? Third, if it was borrowed without previous authority, and was not afterwards, with knowledge, ratified by the corporation, did it receive the use and benefit of the money?" In Love et al. v. Metropolitan Church Ass'n et al., 184 Ill. App. 102, a bill was filed against the Church Association to foreclose a mortgage in favor of the complainant. The note and trust deed were signed as follows: "Metropolitan Church Association. Duke M. Farson, Pres. A. L. Harvey, Secy.," and it was contended by the Association that the president and secretary of its board of directors or trustees had no power or authority to execute the trust deed and note described in the bill because there had never been passed by the Association or its board of trustees any by-law, resolution or any authority whatever, to authorize the president and secretary to sign the trust deed and note, and that the board of trustees of the Association had not, at any time, ratified the action of its president and secretary in executing the instruments. In its opinion the court states: "The debt for which the note and trust deed here involved were given for money borrowed from a former conservator of the defendant in error's intestate, by the president and secretary of the board of trustees of the plaintiff in error, for the purpose of making a payment upon the purchase price of the property described in the trust deed here involved, which was purchased by the said president and secretary of such board of trustees of plaintiff in error for a church site. Immediately after the completion of the loan in question, a deed to the site was delivered to the said president and secretary of the plaintiff in error, and the plaintiff in error, the Metropolitan Church Association, took possession and have held and used such property for church purposes from that time on. * * * The Metropolitan Church Association, had power, under our statute, to purchase real estate for its corporate purposes, and to borrow money and

[illegible]

[illegible] *et al.*, 1[illegible] [illegible]

mortgage such property to secure such loan, so that the question of its being an act ultra vires, so far as the corporation is concerned, need not be considered. * * * The proof further shows that the treasurer of the plaintiff in error, who was the third member of the board of trustees, paid two instalments of interest upon the note secured by the trust deed in question. * * * These facts present the action of the congregation covering a period of more than eighteen months after the property had been bought, possession taken, loan made and mortgage executed. Very slight circumstances are sufficient to establish a ratification by the plaintiff in error of the acts of its officers where the benefits all inured to the advantage of the plaintiff in error." In conclusion the court stated (p. 106): "The facts in this case warrant us in concluding that the action of the trustees, or officers, was ratified, consented to and acquiesced in; and, beyond question, the plaintiff in error received the benefit of the loan to secure which the note and trust deed were given, and still hold and retain such benefit. In equity the plaintiff in error will not be permitted to accept the benefits of the agent's contract, and, at the same time, repudiate that part of the agent's acts by which it secured title to the property." In Illinois Conference of Evangelical Ass'n v. Plagge, 177 Ill. 431, it appeared that the association was a corporation organized under the provisions of the Corporation act, which authorizes the formation of corporations "not for pecuniary profit." The court held that in order to hold a religious corporation not for pecuniary profit responsible for the act of its treasurer in borrowing money for the society and giving its notes therefor, it is not indispensible to a compliance with section 32 of the Corporation act that the records of the society should expressly show that a majority of the members voted to borrow the money or to ratify the treasurer's action, and that ratification by a religious corporation of the act of its treasurer

[illegible]

in borrowing money is established by the record of the society's proceedings, which shows that the treasurer received the money as a loan to the society and issued its notes evidencing the loan, that the trustees used the money for the society and paid interest on the notes, and that the society, as a body, was advised of the indebtedness and payments of interest and approved such action of the trustees. In the instant case the complainant went into possession of the premises purchased in December, 1926, services have been conducted in the church since December, 1926, and the complainant was still in possession of the premises at the time of the trial. From July, 1926, to April, 1929, it met, monthly, the installments of principal and interest required of it under the trust deeds, upon the express authority of the Church. On May 9, 1929, the following letter was sent to Flower Brothers:

"BROADLY HUMANITARIAN - NON-SECTARIAN - SERVING ALL

THE PEOPLE'S COMMUNITY CHURCH OF CHRIST
and

METROPOLITAN COMMUNITY CENTER

South Parkway at 41st Street
Rev. W. L. Cook, Minister and Director
CHICAGO, ILL.

May 9th, 1929.

Flower Brothers,
Investments & Securities
400 East 47th Street
Chicago Ill.

Gentlemen:

We have received both of your communications relative to the payments on obligations held by you and against the Metropolitan Community Center.

I beg to advise that we are doing our best to meet all the obligations against the church. At the present we are hard pressed for funds with which to meet the obligations you hold, as well as the obligations to the First Presbyterian Church. On account of your insistant demands, we have done our best to meet the payments you required of us, and have been unable therefore, to do our duty toward the First Presbyterian Church. We are trying to catch up in our payments with the First Presbyterian

[illegible]

[illegible]

[illegible]

Church and feel assured that you will indulge us a few days in which we are raising money to pay on our obligations held by the First Presbyterian Church.

We wish to inform you that just as soon as we have sufficient funds on hand, we shall be glad to take this matter up with you.

Thanking you in advance, I am,

Very respectfully,

Wm. D. Cook
Wm. D. Cook
Director and Chairman of the
Trustee Board.

Wm. A. Winston
Wm. Winston
Sec'y. Trustee Board."

Approximately three years elapsed between the date of the execution of the notes and trust deeds and the date of the sending of this letter. During all that time the complainant had accepted the benefits resulting from the contracts of its officers and had ratified the acts of the latter, and there is force in the argument of the defendants that the complainant is now seeking to evade its obligations solely because of its financial difficulties. However much we may sympathize with the Church in its financial difficulties, we must enforce the law that applies to the facts of the case.

We have carefully considered all of the contentions raised by the complainant. None of them, in our judgment, has any real merit. The decree of the Superior court of Cook county is affirmed.

AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

Chorion and that assures that we will [illegible] as [illegible] we [illegible] which we are making money by pay on our [illegible] line held by the First Presbyterian Church.

We wish to inform you that [illegible] and [illegible] funds on hand, it shall be [illegible] [illegible] of [illegible].

Thanking you in advance, I am,

Very respectfully,

Mr. A. Jackson
Mr. H. Cook
Trustees and [illegible] of the
Trustee Board.

Mr. A. Jackson
Mr. Hinton
Sec'y. Trustee Board.

Approximately three years ago [illegible] of the [illegible] of the [illegible] and [illegible] of this letter. [illegible] the benefits resulting from the [illegible] of [illegible] and [illegible] the duties of the Pastor, [illegible] in the [illegible] of the debenture. But the [illegible] is not [illegible] [illegible] obligations [illegible] of the financial [illegible]. However much we may sympathize with the Church in its financial difficulties, we must enforce the law and [illegible] to the [illegible] of the [illegible].

We have carefully considered all of the communication related by the complainant. [illegible], in our judgment, has any real merit. The [illegible] of the Appelon court of [illegible] County is affirmed.

[illegible]

Dridley, [illegible], and [illegible], [illegible] concur.

34910

THE METROPOLITAN COMMUNITY CENTER, THE PEOPLES CHURCH, a religious Corporation, Appellant, v. HARVEY A. WATKINS et al., Appellees.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

ADDITIONAL OPINION UPON PETITION FOR REHEARING.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In its petition for a rehearing the complainant argues that the fact that the chancellor found that the trustees of the complainant church were not authorized to execute the collateral note in the sum of $9,000, secured by trust deeds in the sum of $22,500, dated February 24, 1927, and ordered "that the said Note and the collateral secured thereby or so much thereof as has not been delivered to the Complainant, be delivered by the defendants herein to the Complainant and cancelled," "shows that the bill should not be dismissed for want of equity." It is a sufficient answer to this contention to say that the decree does not order the bill dismissed for want of equity. The complainant further contends that as the chancellor found that it was entitled to relief as to the $9,000 note, it was error to tax the costs against it. The point as to costs is made for the first time in the petition for rehearing and it therefore cannot be now considered.

PETITION FOR REHEARING DENIED.

Gridley, P. J., and Kerner, J., concur.

1927

34944

THOMAS MALONEY,
Appellee,

v.

THOMAS J. GRADY, doing
business as T. J. Grady
& Company,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

265 I.A. 650

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Thomas Maloney, plaintiff, sued Thomas J. Grady, doing business as T. J. Grady & Company, defendant, in the Municipal Court of Chicago in an action of the first class. There was a trial before the court, with a jury, and a verdict was returned finding the issues against the defendant and assessing the plaintiff's damages at the sum of $947.21, "with interest at 7% on $600 note, from November 22, 1924, amounting to $242.93." Judgment was entered in the sum of $1,190.14 and the defendant has appealed.

No point is raised on the pleadings. Plaintiff's theory of fact is that he loaned the defendant $600 about November 24, 1924, and that he is entitled to interest thereon at six per cent per annum and that the defendant owes the plaintiff $75 for rents the defendant collected for the month of February, 1927, and $440 for rents collected for the months of March and April, 1927, from one of the plaintiff's buildings, less $73.65 paid out by the defendant for expenses connected with the building. The defendant thus states his theory of fact: "The plaintiff together with John Regan purchased a lot from the defendant at the price of $2,400, the title to which was to be taken in the name of the plaintiff and that the $600 cashier's check was turned into the office of the defendant as the initial payment on said lot; that the balance of $1,800 was paid by check of plaintiff

THOMAS [illegible],
Appellee,

v.

THOMAS L. [illegible], doing
business as [illegible]
& Company,
Defendant.

December 6, 1924, at the time a deed dated December 6, 1924, conveying said lot to the plaintiff was delivered to plaintiff and thereafter recorded. That the defendant collected on behalf of the plaintiff $395 in rents, for which defendant is entitled to credit by reason of an adjustment made between the attorneys for the parties hereto in other litigation, and that the defendant paid out and expended on behalf of the plaintiff the sum of $73.65 for money paid out in managing plaintiff's building, which sum has never been repaid to the defendant, and the plaintiff did not loan $600 to the defendant." As the plaintiff argues, defendant's theory of fact was not supported by evidence. However, the jury, by their verdict, have found adversely to the defendant on all of the material issues of fact, and we are in accord with the verdict.

The defendant contends that the evidence fails to show that Regan was authorized by the defendant to borrow $600 from the plaintiff. We find no merit in this contention. The defendant saw fit not to take the stand in his own behalf, and there is sufficient evidence in the case to warrant the jury in finding that Regan, in borrowing the $600 from the plaintiff, acted as the agent of the defendant. It is undisputed that the defendant obtained the $600 and deposited it in the bank to his own account.

The defendant contends that the court erred in excluding "the statement of adjustment between the parties hereto used as the basis of settlement of the Appellate Court litigation between the same parties, which gave credit to defendant for the $395 rent in question." There is not the slightest merit in this contention. The statement in question appears to have been one which the bookkeeper of the defendant claims to have sent to the defendant's lawyer. Such a statement, of course, had no binding effect on the plaintiff. The undisputed testimony of Attorney Dolan shows that

December 6, 1924, a. the time [illegible] conveying said lot to the plaintiff [illegible] and thereafter [illegible] of the plaintiff 1500 in cash, for which [illegible] credit by reason of an adjustment [illegible] the parties hereto in [illegible] out and expended on behalf of the plaintiff [illegible] money paid out in assuming plaintiff's [illegible] been repaid to the defendant, and the plaintiff [illegible] to the defendant." [illegible] the plaintiff [illegible] fact was not supported by evidence. [illegible] verdict, have found negatively to the defendant on all of the material issues of fact, and we are in accord with the verdict.

The defendant contends that the evidence fails to show that Hogan was authorized by the defendant to [illegible] from the plaintiff. We find no merit in this contention. The defendant has [illegible] not to take the stand in his own behalf, and there is sufficient evidence in the case to warrant the jury in [illegible] the [illegible] borrowing the [illegible] from the plaintiff, [illegible] the agent of the defendant. It is emphasized on the [illegible] and deposited it in the bank to his own account.

The defendant contends that [illegible] in [illegible] "the statement of adjustment between the parties [illegible] the basis of settlement of the [illegible] the same parties, [illegible] in question." There is [illegible] the statement [illegible] The statement in question appears to have been [illegible] keeper of the defendant claims to have sent to the [illegible] lawyer. Such a statement, of course, [illegible] on the plaintiff. The uncontroverted testimony of [illegible] shows that

a former adjustment of rents made between the parties did not include the items claimed by the plaintiff in the instant suit.

The defendant contends that "the question whether John Regan was a partner of Grady was improperly introduced in this case by the plaintiff and was a misleading and false issue." It appears that the witness Regan stated that he was a partner of the defendant, and the defendant saw fit to cross-examine him at length on this subject. At the conclusion of the evidence the defendant made no motion to strike out the evidence on the subject of the alleged partnership. In fact, the defendant did not hesitate to use the evidence in support of a claim that if there was a partnership between the defendant and Regan then the instant suit should have been against the partnership and not against one member of it. However, the plaintiff sued the defendant and not a partnership, and in the defendant's amended affidavit of merits he states that "John Regan was never a partner of said Thomas J. Grady."

The defendant next contends that "the trial Court made improper remarks in the presence and hearing of the jury prejudicial to the defendant." In support of this contention the defendant cites a statement made by the trial court in passing upon the admissibility of a certain receipt. The record shows that the defendant made not the slightest objection to the statement of the court and the present contention is plainly an afterthought. However, we find nothing prejudicial in the statement of the court.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

35078

PROCTOR [illegible],
Appellee,

v.

W. H. [illegible],
Appellant.

MR. [illegible]

The defendant, [illegible] appeals from a judgment entered in favor of the plaintiff, [illegible] amounting, to the sum of $1,297.63. The cause was tried before the court, with a jury, and a verdict [illegible], upon which judgment was entered.

The declaration alleges that on June [illegible], the defendant executed his promissory note for $[illegible], payable to the order of Benjamin F. Graham, by the name, style and description of B. F. Graham, "six months after the date thereof for value received, with interest at the rate of [illegible] per cent per annum;" that Graham, before the maturity of the note, [illegible] it and then delivered it, so indorsed, to the plaintiff, and that the note was duly protested for non-payment, on [illegible] 1923. The defenses in the lower court, [illegible] up [illegible], may be briefly stated as follows: (1) that plaintiff [illegible] the holder of the note [illegible]; (2) that [illegible] upon condition that it [illegible] to secure a [illegible] until plaintiff paid a certain note [illegible] not paid the last mentioned note [illegible] pay any value for the note [illegible] maker. In this court all of the defenses have been abandoned save one, viz., that the plaintiff [illegible]

at the time the instant suit was started and therefore he could not, under the law, maintain the action. The rule that the action must be brought in the name of the party having the legal title to the note at the time of the commencement of the suit, is based upon the theory of law that a defendant has the right to have a judgment rendered against him in favor of the legal holder, so that the judgment may be a bar to a future recovery on the same instrument. The sole contention of the defendant in this court is that he was prevented from showing that the State Bank of Beverly Hills was the legal holder and owner of the note at the time of the commencement of the suit. The defendant states: "On the trial of the case the defendant attempted to prove (which offer of proof was rejected by the court), that prior to the institution of the suit in question and on January 7, A. D. 1929, an action was commenced against the defendant upon this note by the State Bank of Beverly Hills; that the plaintiff in that case was represented by the same counsel who now appears as attorney for the plaintiff in the instant case; that this counsel made an affidavit as a part of the statement of claim in the Municipal Court of Chicago in which he affirmed the allegations in the statement of claim (to the effect that the State Bank of Beverly Hills was the owner and holder of the note in question). The defendant further offered to prove (objection to such offer being sustained by the court) that on February 14, A. D. 1930, the case in the Municipal Court of Chicago came on for hearing and was partially tried when the cause was stricken from the short cause calendar in that court; that immediately thereafter and on the 19th day of February, A. D. 1930, a non-suit was taken by the plaintiff in the Municipal Court case and the suit dismissed. The cause of action now before this court was commenced in the Superior Court of Cook County two days after the dismissal

at the time the instant suit was [illegible] on the [illegible] [illegible] [illegible] under the law, exists in the [illegible]. In [illegible] [illegible] action must be brought in our [illegible] the party [illegible] the legal title to the note or the right of the [illegible] [illegible], is based upon the theory of [illegible] [illegible] [illegible] have a judgment rendered against him in favor of the legal owner, so that the judgment may be a bar to a future recovery on the same instrument. The sole contention of the defendant in this court is that in [illegible] prevented from showing [illegible] [illegible] Beverly Hills was the legal owner at and before the date of the note or at the commencement of the suit. The [illegible] before the trial of the case the defendant [illegible] a [illegible] which offer of proof was rejected by the [illegible] that prior to the institution of the suit in question was a [illegible] [illegible] [illegible], an action was commenced against the defendant upon this note by the State Bank of Beverly Hills; that the plaintiff in that case was represented by the same counsel who now appears as attorney for the plaintiff in the instant case; that this counsel made an affidavit as a part of the statement of claim in the Municipal Court of Chicago in which he affirmed the allegations in the statement of claim (to the effect that the State Bank of Beverly Hills was the owner and holder of the note in question). The [illegible] [illegible] [illegible] to prove (objection to such offer being sustained by the court) that on February 11, [illegible], 1930, the case in the Municipal Court of Chicago came on for hearing and a default was taken; that [illegible] stricken from the docket, cause dismissed in [illegible] court; that thereafter and on the 12th day of February, [illegible], a judgment was taken by the plaintiff in the Municipal Court case and the suit dismissed. The cause of action now before this court was commenced in the Superior Court of Cook County [illegible] after the dismissal

of the Municipal Court case. Objections to further offers of proof were sustained by the court with reference to the testimony of the vice-president of the bank in the Municipal Court of Chicago on the 14th day of February, A. D. 1930 (one week before the present suit was commenced), to the effect that the bank on that date was the legal holder and owner of said note, having purchased the same from Proctor D. Remenhouse (plaintiff in the case now before this court). The defendant, in his pleadings, sets forth, among other things, that the plaintiff in this case was not the legal holder and owner of the note at the time of the institution of the present suit." It would be a sufficient answer to the instant contention to say that the defendant called as a witness the vice-president of the bank and that the testimony of this witness showed clearly that the bank disavowed any legal title or ownership in the note at the time of the commencement of the instant suit and that it recognized the plaintiff as having the legal title and ownership in the note. Having taken this position, the judgment in the instant case would be a bar to any future recovery by the bank on the same instrument. The material facts in the case are plain. On December 7, 1928, after Graham had indorsed the note and delivered it to the plaintiff for value, the plaintiff discounted the note at the State Bank of Beverly Hills upon plaintiff's depositing his check in the sum of $2,500 as security. Prior to the commencement of the instant suit, at the request of the bank, the plaintiff paid his obligation to the bank on account of the said note by means of the $2,500 check that he had put up as security. The bank then turned the note back to the plaintiff and, as has been heretofore stated, no longer claims any interest in it. The evidence excluded by the trial court, upon which ruling the defendant now relies for a reversal, relates solely to occurrences that took place prior to the time that the note was

of the municipal corporation. [illegible] proof were submitted by the [illegible] of the vice-president of the bank in the [illegible] of Chicago on the 14th day of [illegible], [illegible] the proceeds [illegible] that date [illegible] the legal title [illegible] chased the [illegible] now before this court. [illegible] forth, among other things, that [illegible] the legal holder [illegible] of the present [illegible] consideration [illegible] president of the bank and [illegible] clearly shows [illegible] note at the time [illegible] recognized the [illegible] the note. [illegible] case would be [illegible] instrument. [illegible] 7, 1929, [illegible] plaintiff for value, the [illegible] Bank of Sevally [illegible] sum of [illegible] out, at [illegible] to the bank on account of the said note [illegible] that he [illegible] to the plaintiff [illegible] any interest in it. [illegible] which [illegible] to [illegible] note [illegible]

redelivered to the plaintiff by the bank. At the time of the maturity of the note it was in the hands of the bank and it protested the note when the defendant failed to meet the same. The defendant complains that the court erred in refusing to allow him to prove that on January 7, 1929, after the note had been protested, the bank sued the plaintiff in the Municipal Court of Chicago for non-payment of the note; that in that suit the bank claimed to be the owner of the note, and on February 19, 1930, the bank took a non-suit. As the evidence shows that after the non-suit and before the filing of the instant suit plaintiff was required by the bank to take up the note and that he did so and that from that time the note remained in his possession, the introduction of the offered evidence would not tend to prove that the legal title to the note was not vested in the plaintiff at the time the suit was instituted and the introduction of such irrelevant evidence would serve only to confuse the jury as to the real issue. Certain undisputed facts make it plain that the plaintiff had the legal title to the note at the time of the commencement of the suit, and even if the bank had a beneficial interest in the note, that fact would be no defense to the instant case. (See Henderson v. Davisson, 157 Ill. 379.) Many cases might be cited, if it were necessary, in support of this well known principle of law. In fact, the case that the defendant relies upon (Burnap v. Cook, 32 Ill. 168) clearly supports this rule. In that case the court, while stating the well known rule that the party having the legal title to a note must sue in his own name, also states: "As far as the interest of the debtor is concerned, it matters little in whom the equitable beneficial interest may be vested. That is a question between the holder and beneficiary. * * * In this case the assignment seems to have been complete, and the legal title to the note vested in the

plaintiff at the time this suit was instituted. It is not a question that affects the rights of these parties, whether any or what consideration was paid for the note by plaintiff below. The equities between the defendant in error and his assignor do not concern the plaintiff in error."

There is no merit in this appeal and the judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

plain [illegible] of the [illegible] [illegible] [illegible] [illegible] [illegible] question that affords [illegible] [illegible] [illegible] or what [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] The equation [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] do not [illegible] the plaintiff [illegible].

There is no merit in these [illegible] [illegible] [illegible] the [illegible] for costs of [illegible] [illegible] [illegible] [illegible].

[illegible]

Dailey, [illegible] [illegible] [illegible] [illegible] [illegible].

35037

N. A. COBB,
Appellant,

v.

LAURA HARNEY RATHBONE,
Executrix of the Last
Will and Testament of
HENRY R. RATHBONE, Deceased,
Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

263 I.A. 650[4]

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On October 19, 1929, N. A. Cobb filed a claim in the Probate court of Cook county against the estate of Henry R. Rathbone, deceased. The claim was "For Professional Services Rendered To services rendered in the cases of Charles R. Binder vs. Harry G. DuBois, Clinton M. DuBois, Anna M. McCoy and the Estate of Guy A. DuBois $3000.00." Attached to the claim was the affidavit of the claimant, in which he deposed that the claim "is just and unpaid, after allowing for all just credits, and that there are no set-offs or counter-claims against the same." The Probate court, after evidence heard, disallowed the claim. Upon an appeal to the Circuit court the matter of the claim was tried de novo before the court, without a jury, and it was again disallowed. From an order dismissing and disallowing the claim the claimant has appealed.

The deceased, Henry R. Rathbone, was an attorney practicing at the Chicago bar. He was also a congressman. The claimant is an attorney practicing in Michigan. Charles Binder et al., residing in Battle Creek, Michigan, had a claim against Harry G. DuBois, Clinton M. DuBois, Anna M. McCoy and the Estate of Guy A. DuBois. Attorney Salisbury, of Battle Creek, first handled the matter for them. He died, and the claimant, who had been in his office, was employed by

M. A. COBB, Appellant,	
v.	
LAURA MAUNDY ATHONS, Executrix of the Last Will and Testament of HENRY F. ATHONS, Deceased, Appellee.	

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT:

On October 1, 1949, M. A. Cobb filed a claim in the Probate court of Cook county, against the estate of Henry F. Athons, deceased. The claim was for "for contractual services Rendered To services rendered in the [illegible] of Henry F. Atheon va. Mary E. Mabie, Ilsen L. Lincoln, [illegible] and the Estate of Ray L. Lincoln [illegible]." Attached to the claim was the affidavit of the claimant, in which he swore that the claim "is just and unpaid, after all lawful credits, and that there are no set-offs or counter-claims against the same." The Probate court, after evidence heard, disallowed the claim. Upon an appeal to the circuit court the matter [illegible] claim was tried de novo before the court, without a jury, [illegible] claim was allowed. From an order [illegible] the claim the claimant has appealed.

The deceased, Henry F. Athons, [illegible] an attorney practicing at the Chicago bar. He was also a businessman. The claimant is an attorney practicing in Michigan. [illegible], residing in Battle Creek, Michigan, [illegible] claim against Henry F. Athons, Ilsen L. Lincoln, Mary E. Mabie, Ruth M. Lincoln and the Estate of Ray L. Lincoln. Attorney Salisbury, of Battle Creek, filed a handled the matter for them. He died, and the claimant, who was [illegible] in his office, was employed by

Binder et al. to prosecute the claim. Some time later, before any suit was started, Binder, Switzer and Lovell, who were interested in the claim, went with the claimant to Chicago to retain the deceased. They met him on September 21, 1914, and he then agreed to become an attorney in the case and "to fight" the claim "to a final and successful issue;" that he was to be paid for his services fifty per cent of the amount realized from the claim, and Binder et al. were to receive the remaining fifty per cent. The deceased settled the claim, in 1917, for $30,000 and the first payment on the same was made in June, 1917, and the last on August 12, 1919. The total amount paid was $29,500. Apparently the balance due, under the settlement, $500, was never paid. Rathbone retained $15,000 for his compensation and paid the balance, $14,500, to Binder et al. The latter then paid the claimant twenty per cent of the amount they received. The claim of Cobb is based upon the testimony of Chris Switzer given in the Circuit court. He did not testify in the trial in the Probate court. Switzer testified that he secured personal injury cases for the deceased and that he did detective and investigation work for him in connection with these and other cases and that he received pay from the deceased for his services in these matters; that he was interested with Binder et al. in the claim against the DuBoises; that he talked with the deceased about the claim and that the latter said that he would like to get into the case; that he (Switzer) then told the claimant, Binder et al. that if they were going to employ another attorney the deceased would be a very able assistant in the matter; that subsequently the claimant, Binder and the witness met the deceased in Chicago, in September, 1914, where the matter of the claim against the DuBoises was talked over; that "the matter of compensation for Mr. Rathbone came up and he said that he would take it on a fifty percent basis and us people having gave Mr. Cobb an absolute Power of Attorney Irrevocable on the same

Binder et al. [illegible]

any fault [illegible] trial, [illegible]

interpleader in the [illegible]

retain the deposit. [illegible]

that appear to become an action [illegible]

claim "is a final and successful [illegible]

for his services [illegible]

claim, and Binder et al. [illegible]

The decision [illegible]

payment of [illegible]

12, 1910. The legal amount paid [illegible]

balance due, under the [illegible]

retainer [illegible]

to Binder et al. [illegible]

of the amount [illegible]

testimony of [illegible]

[illegible] in the [illegible]

the amount [illegible]

detective and [illegible]

and other [illegible]

services in [illegible]

in the claim [illegible]

about the claim [illegible]

into the [illegible]

that it [illegible]

be a [illegible]

Binder [illegible]

where the [illegible]

that "the [illegible]

that he [illegible]

gave Mr. [illegible]

basis, questioned as to who would take care of Mr. Cobb in this matter. Mr. Rathbone stated that he would take care of Mr. Cobb for anything that came up subsequent to this time but that we, the officers and interested parties, would have to take care of Mr. Cobb in anything that might have happened before. Mr. Rathbone stated also at this time that he would take care of Mr. Cobb on the usual basis. * * * He said the amount was to be paid when the final settlement of the case had been made with the DuBois Estate and the Byron-Jackson Iron Works." The witness further stated that shortly thereafter he heard the deceased state to the claimant "that he believed that ten percent of the total amount of the monies collected from the Dubois Estate and the Byron-Jackson Iron Works would be an adequate fee for Mr. Cobb, and the stockholders were to pay him ten percent also;" that the claimant agreed to the proposition and it was further agreed that this division was to be made "at the final settlement of the suit." This witness further testified that the deceased agreed to pay him "ten percent of the amount of his fees for bringing the case to him;" but that he never paid him this amount and that he wrote to the deceased in regard to the matter but that the deceased never made any reply to the letter. A deposition of Binder was introduced by the claimant. Although Switzer testified that Binder was present at the time the alleged contract between the deceased and the claimant was made, Binder testified, in respect to this matter, as follows: "I do not know of my own knowledge that there was any agreement between Mr. Rathbone and Mr. Cobb about this. * * * I do not know anything of any agreement between Mr. Rathbone and Mr. Cobb of any kind." This witness was further interrogated by the claimant as follows: "Q. Were you to pay me for services rendered after the employment there or was Mr. Rathbone to pay? A. We were to pay you for services. We were to pay you 20% of the proceeds of the settlement. Q. That was for what? A. We were to

pay you 20% of our 50%." The claimant introduced no written evidence of any kind to substantiate his claim. He did introduce certain letters written by the deceased to him, but in none of these is there any recognition or reference to the alleged agreement. One of the letters, dated January 15, 1923, contains the following: "I was certainly surprised to receive your letter of January 13th, 1923 You know my position with regard to this matter. I cannot therefore consider your request for payment of $2,250." The claimant did not offer a copy of his letter of January 13, 1923, nor did he offer to prove its contents, and there is nothing in the record to show what his "request for payment of $2,250" was. In any event, whatever request he made, the deceased declines to consider the same. The deceased had received $15,000, which was the full amount of his compensation, by August 12, 1919, and there is nothing in the record to show that the claimant ever demanded or requested of the deceased, in any way, payment of the alleged fee. He knew of the payments made to the deceased, in settlement of the Binder et al. claim, at the time they were made, and he also knew that the deceased retained $15,000 as his compensation. When Binder et al. received payment on account of their fifty per cent they paid the claimant twenty per cent of the same. In all, the claimant received from these parties $3,000. Under all the facts and circumstances in this case the Probate court and the Circuit court were fully justified in disallowing the claim.

The Estate also contended, upon the trial, that even if it could be held that the deceased had made a promise to pay the claimant a certain part of his fee that, nevertheless, the claim would be barred by the Statute of Limitations. To avoid the effect of the plea of the statute the claimant relies upon the following testimony of Switzer: "Q. Did he say anything about when a settlement would be made with Mr. Cobb? A. Yes, he said the amount was to be paid when the final settlement of the case had been made with the DuBois Estate and the

[illegible]

Byron-Jackson Iron Works. * * * Q. Was there any change made at that time as to the time when this division was to be made? A. No, there was not. It was to be at the final settlement of the suit." The claimant contends that by this testimony of Switzer "it is evident that the cause of action under the foregoing contract could not accrue until the final collection had been made in the settlement; until the possibility of collection had ceased or until the death of the deceased, under Section 67 of the Illinois Administration Act," and that "it is definitely established by the letters of Mr. Rathbone, received in evidence, that as late as January, 1923, the final payment on the settlement made with the DuBois Estate had not been made, and therefore under the contract, the claimant's cause of action had not yet accrued." We are satisfied, after a careful consideration of all the facts and circumstances in this case, that the Probate court and the Circuit court would have been justified in disbelieving the testimony of Switzer as to the alleged contract. As we have heretofore stated, Switzer did not testify in the Probate court and the claimant relies upon his testimony in the Circuit court to support his claim. It must have become apparent, after the proceedings in the Probate court, that the plea of the Statute of Limitations would defeat the claim in the Circuit court unless evidence could be produced that would avoid the effect of the statute, and there is much force in the argument of the Estate that the testimony of Switzer was born of necessity. According to the claimant's theory of fact, he was to receive his "fee" from the deceased out of the $15,000 the latter received for his compensation. His contention that under such circumstances he could not exact any money from the deceased because there was $300 due Binder et al., which for some reason had not been paid, and that therefore he was compelled to wait over ten years before he could assert his claim against the deceased, does not appeal to us, especially in view of the fact

Byrne-Jackson Iron Works." [illegible] that time as to the time when this claimant was [illegible] No, there was not. It was to be at the final settlement of the suit." The claimant contends that by this statement of testator "it is evident that the matter of testamentary [illegible] would not accrue until the final settlement [illegible] in the settlement; until the possibility of [illegible] the death of the deceased, upon [illegible] of the claimant [illegible] tation etc," and that "it is manifest, [illegible] of Mr. Hudson, receiver in [illegible] the final payment on the settlement [illegible] not been made, and therefore [illegible] of action had not yet accrued." [illegible] consideration of all the facts and circumstances in [illegible] the probate court and the circuit court [illegible] disbelieving the testimony of [illegible] we have heretofore stated, [illegible] court and the circuit court [illegible] to support his claim. It must [illegible] pendage in the probate court, [illegible] limitations would defeat the claim in the probate court unless [illegible] dence could be produced that would [illegible] and there is no force in the argument [illegible] testimony of [illegible] and's theory [illegible] out of the [illegible] contention [illegible] from the deceased [illegible] for some reason has not been [illegible] to wait over ten years before [illegible] deceased, does not [illegible] in view of the fact

that he, a lawyer, had absolutely nothing in writing from the deceased from which a recognition of the alleged agreement might even be implied. But if the testimony of Switzer is to be given weight, it does not, in our judgment, avoid the effect of the statute. Switzer testified that the amount of the fee was to be paid the claimant by the deceased "when the final settlement of the case had been made with the DuBois Estate and the Byron-Jackson Iron Works." It is conceded that this case was settled for $30,000 in 1917. Binder's testimony does not support the contention of the claimant that the alleged agreement was not to be performed until after all the money due under the settlement had been collected.

The claimant contends that the trial court erred in excluding his exhibit number 45. We think this contention is without merit, but even if it were otherwise, nevertheless, in our judgment the introduction of the exhibit would not have aided claimant's case.

After giving due consideration to all the facts and circumstances in this case, we have reached the conclusion that if a stale claim of this character were to be allowed, no estate would be safe.

The judgment of the Circuit court of Cook county is a just one and it should be and it is affirmed.

AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

1057

35109

ANGIE BROLL,
Appellee,

v.

CITY OF CHICAGO,
a Municipal Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Angie Broll, plaintiff, sued the City of Chicago, a municipal corporation, defendant, in an action in case. There was a trial before the court, with a jury, and a verdict was returned finding the defendant guilty and assessing the plaintiff's damages in the sum of $5,000. Judgment was entered upon the verdict and the defendant has appealed.

The declaration alleged, inter alia, that on May 14, 1928, in the City of Chicago, while she was walking on a public sidewalk in the city, her foot slipped or went into a hole at the edge of the sidewalk "in front of 63 E. Adams Street, and in front of B & G Sandwich Shop, in said City," and that she was thereby caused to slip and fall upon the sidewalk and received injuries, internal and external, in and about the head, arms, spine, back, legs, and abdominal and pelvic organs, from which she will forever remain sick, sore, lame, etc., and that she suffers and will continue to suffer as long as she lives, etc. No question is raised as to the pleadings. The defendant contends that "the evidence does not disclose the cause of the appellee's falling. (1) No one saw her step into the so-called hole in the edge of the walk at the alley. * * * None of the witnesses saw her foot go into the hole. She fell, we will grant, but it

nowhere appears that the City of Chicago is to blame for her falling." There is no merit in this contention, and, as the plaintiff contends, it is difficult to believe that it is made seriously. It appears from the evidence of the plaintiff that more than two years prior to the time of the accident a large truck had broken a section of the stone sidewalk extending north from the east line of the building located at 63 East Adams street, Chicago. The truck also made a break in the iron covering over the inner half of the walk, so that there was a triangular piece out of the metal covering. The stone sidewalk had been in place more than twenty-three years. It was not level, but had "an exaggerated toboggan." The iron was "so old that the corrugation had been very well worn, making the iron very slippery." Prior to the time of the accident in question, others had slipped and fallen at the place where the triangular break existed, where plaintiff caught her foot. The plaintiff was employed, on the day of the accident, as a bookkeeper and cashier. After leaving her work on the evening in question, she was walking east on Adams street, about 7 p. m., to take a motor bus to the north side, where she lived. She was walking immediately in the rear of several other pedestrians and she did not see the broken walk, nor had she any knowledge of the same. Just before reaching the alley she stepped into the triangular hole where the metal grating and stone had broken off, and in an effort to regain her footing she stepped with her other foot on the inclined portion of the stone walk, when both feet "shot out from under" her, and she fell or sat down with "terrific force" near the alley edge, and also struck the back of her head on the metal walk. Her statement as to the manner of the accident is corroborated by the witness Louis Davis. Two architects, named MacGillivray and Kiseman, who were strangers to the plaintiff, saw her lying on the walk in close proximity to the metal portion that was broken. Their

newborn [illegible] [illegible]
falling. [illegible]
plastic [illegible]
serious[illegible]. [illegible]
more than two years [illegible]
truck had broken [illegible]
from the east line of the [illegible]
Chicago. The truck also [illegible]
inner half of the [illegible]
the metal covering. [illegible]
twenty-three years. [illegible]
toboggan. [illegible]
wall room, making the [illegible]
the moisture [illegible]
where the [illegible]
The plaintiff [illegible]
keeper and [illegible]
question, [illegible]
take a water hose to the [illegible]
immediately in the rear of several [illegible]
see the broken [illegible]
before re[illegible] [illegible]
the metal or [illegible]
regain her footing [illegible]
portion of the [illegible]
her, and the [illegible]
edge, and also [illegible]
statement [illegible]
witness [illegible]
Bierman, [illegible]
walk in close pro[illegible]

testimony shows the dangerous character of the sidewalk at the place in question and that it had been out of repair a number of years. MacGillivray testified that he had slipped at the point in question, but recovered himself, and Eiseman testified that he had fallen at the same point in 1926. The City offered no rebuttal evidence as to the manner of the accident. The plaintiff made out a clear prima facie case and the jury were justified in finding from the evidence that the defendant was guilty of the negligence charged in the declaration and that the plaintiff was in the exercise of ordinary care for her own safety at the time of the accident.

The defendant contends that the verdict is largely in excess of any injuries shown to have been sustained by the testimony of the plaintiff's witnesses. We find no merit in this contention. The evidence not only shows that the plaintiff sustained physical injuries on account of the accident, but that her loss of salary due to it exceeded $2,000. No complaint is made as to the instructions bearing on the question of damages and we would not be justified in disturbing the amount of the verdict.

In the original brief of the defendant no complaint was made as to any of the instructions, but in the reply brief the defendant complains that the trial court erred in giving to the jury, at the instance of the plaintiff, instructions three and five. After the filing of the defendant's reply brief, the plaintiff filed, in this court, a motion that the complaint as to the instructions be disregarded on the ground that the new matter contained in the reply brief was waived by the failure of the defendant to present the same in its original brief. Rule 19 of this court provides: "Reply briefs, if any, shall not raise any new points but shall be confined strictly to points presented by the brief of the opposing party." This rule is well known to all attorneys, and

testimony [illegible] be
place in [illegible]
years. Modifiedly [illegible]
in question, but [illegible]
be [illegible] one pole [illegible]
rebuttal evidence [illegible] the evidence. The [illegible]
made out a [illegible] in the jury [illegible]
finding from the evidence [illegible] the validity of the [illegible]
ligence charged in the [illegible] the plaintiff [illegible]
the exercise of ordinary care [illegible] the time of the
accident.

The [illegible] contention [illegible] is largely an
excess of [illegible] to [illegible] the [illegible]
of the plaintiff's [illegible]
The evidence [illegible]
injuries on [illegible]
due to it excessive [illegible]
attention [illegible]
justified in [illegible]

In the [illegible]
made as to any of [illegible]
defendant complains [illegible]
jury, as the [illegible]
tive. [illegible]
ciff filed, in which [illegible]
instructions [illegible]
stated in the reply brief [illegible]
to present the case in the [illegible]
provident [illegible]
and about [illegible]
the opposing party." [illegible]

we have frequently held that any error in the record relating to the giving or refusing of instructions which is not argued in the opening brief is waived and cannot afterwards be availed of by the appellant. (Tindall v. Chicago & Northwestern Ry. Co., 200 Ill. App. 556, 575; Welch v. City of Chicago, 323 Ill. 498; Warden Coal Washing Co. v. Meyer, 98 Ill. App. 640, 644; Equitable Powder Mfg. Co. v. C., C., C. & St. L. R. Co., 155 Ill. App. 265, 271-2; Mongoven v. Watts, 258 Ill. App. 106, 112.) The same rule prevails in the Supreme court. In City of Waukegan v. Wetzel, 261 Ill. 498, 502, the court said: "Certain other objections are raised by appellants in their reply brief which are not raised in the original briefs filed. Under the rules of practice in this court such questions can not be considered." (See also Pirola v. Turnes Co., 238 Ill. 210, 213; Gage v. City of Chicago, 211 Ill. 109, 112; The Indiana Millers' Mutual Fire Ins. Co. v. The People, 170 Ill. 474; West Chicago Park Commissioners v. City of Chicago, 170 Ill. 618.) That there is merit in the motion of the appellee cannot be questioned. However, we have examined the two instructions. Number five is the same instruction as was passed upon by this court in Welch v. City of Chicago, 236 Ill. App. 520, 537. In that case it was known as instruction number two, and this court refused to sustain the objection raised to it. The Supreme court, in passing upon the objections to the instruction (Welch v. City of Chicago, 323 Ill. 498, supra), said (p. 504): "This instruction did not direct a verdict nor did it attempt to fix liability. It simply stated a proposition of law about which there can be no controversy. From a reading of the whole instruction it cannot be said that the court has assumed by it that the crosswalk was unsafe." As to instruction number three, which does not direct a verdict, while it is true, as the defendant contends, that it is ungrammatically and loosely drawn, nevertheless, we do not believe that a jury could have been

[illegible]

misled by it, especially in view of the defendant's given instructions. Defendant's given instruction number 12 reads as follows: "The court instructs the jury that while it is the law that a person using a public sidewalk has the right to assume that it is reasonably safe for travel by persons using ordinary care for their own safety, still if a person has knowledge that a sidewalk is in bad and unsafe condition for travel, or would by the exercise of ordinary care on her own part, have known it, then you are instructed that such persons, under the law, would have no right to assume and regulate her conduct upon the assumption that it was in a good condition contrary to her actual knowledge, or such knowledge as, by the exercise of ordinary care on her part, under all the circumstances as shown by the evidence, she would or should have had."

The judgment of the Superior Court of Cook county is affirmed.

AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

[illegible]

[illegible]

follows: "The Court [illegible]

that a person using a public [illegible]

it is reasonable safe for travel [illegible]

their own safety, while if a person [illegible]

is in bad and unsafe condition for travel [illegible]

of ordinary care on her own part, [illegible]

attached the same reason, [illegible]

assumes and [illegible]

a good condition [illegible]

ma, by the exercise of [illegible]

circumstances as shown by the [illegible]

had."

The judgment of the superior court [illegible]

affirmed.

[illegible]

Brickly, [illegible] concur.

35138

HENRY HERMAN,
Appellee,

v.

EDWIN McNEAL, doing
business as McNEAL & COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT
COOK COUNTY.

263 I.A. 851

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Henry Herman, plaintiff, sued Edwin McNeal, doing business as McNeal & Company, defendant, in an action of trespass on the case for damages sustained by reason of fraud and deceit alleged to have been practiced on the plaintiff by the defendant. The case was tried before the court, with a jury, and a verdict was returned finding the issues in favor of the plaintiff and assessing his damages at the sum of $1,500, "plus 5% interest from date of transaction." Judgment was entered in favor of the plaintiff in the sum of $1,716.83 and the defendant has appealed.

No question is raised on the pleadings. The theory of fact of the plaintiff was that one C. W. Schimberg was an agent of the defendant and that through Schimberg the defendant offered to deliver to the plaintiff certain bonds in exchange for certain stock of the plaintiff; that the defendant represented that these bonds were secured by a first mortgage on the premises known as 6511-25 Ellis avenue, Chicago; that the said representation was false and known to be false by the defendant; that there appeared of record against the property two trust deeds unreleased and prior in date to the trust deed securing the said bonds; that the representation was fraudulently made for the purpose of inducing

[illegible]
Appellee,

v.

[illegible]
business as [illegible]
Appellant.

[illegible]

[illegible] plaintiff, [illegible] an attorney, doing business as [illegible] company, [illegible], in [illegible] on the case for damages [illegible] alleged to have been produced [illegible] the case was tried before the court, [illegible] was taken [illegible] in the sum of [illegible] assessed [illegible] date of trial [illegible] plaintiff [illegible] of $1,[illegible] [illegible] in [illegible]

[illegible] fact of the [illegible] one [illegible] the defendant [illegible] deliver to the [illegible] stock of the [illegible] bonds were [illegible] 6231-33 [illegible] avenue, [illegible] false and [illegible] of [illegible] against the [illegible] in date [illegible] representation [illegible]

the plaintiff to accept the bonds in exchange for his said stock, and that as a direct result of the said representation the plaintiff was induced to accept the bonds in exchange for his stock. It was agreed by the parties that the value of the plaintiff's stock at the time of the transaction was $1,500. The major contention of the defendant was that Schimberg was not his agent, that Schimberg, in his dealings with the plaintiff, acted as an independent dealer, and that the defendant, in his dealings with the plaintiff and Schimberg, acted solely as a broker, to whom was intrusted the execution of the exchange contract. The defendant also contends that the evidence shows that no false representation was practiced upon the plaintiff by Schimberg or the defendant.

The defendant contends that "the alleged representations complained of were made by Schimberg and not by the defendant," and that "Schimberg was not his agent." On February 17, 1928, Schimberg called on the plaintiff at the latter's home in Antioch, Ill. At that time the plaintiff owned 75 shares of Central Cemetery stock, which, it is agreed, was then worth $1,500. Schimberg stated to the plaintiff that he had some bonds that would pay the plaintiff much better interest than the Cemetery stock, "some gold bonds, first mortgage bonds here in Chicago," and that he would give the plaintiff "twenty $100.00 bonds, for the 75 shares of stock * * * the cemetery stock." Schimberg stated that the bonds were on a "flat building here in Chicago, Allis Avenue Flats." The plaintiff testified that Schimberg "told me he was with McNeal & Company, and so I signed the contract;" that Schimberg stated "they were gold bonds, * * * all I had to do was to send my coupons in and get my money on it. He said that would be very much better than what I had on the cemetery stuff." At that time Schimberg wrote out, and the plaintiff signed, the following:

"Mr. C. F. Schimberg,
% N. McNeal & Co.

Antioch, Ill. 2/17/28

I agree to accept $2000 in the Golden Bonds bearing 6-1/2% in lieu of 75 shares Central Cemetery and $2000 in the Golden Bonds bearing 6-1/2% in lieu of 200 shares Memorial Parks and Mausoleum Company.

Henry Herman

RFD #3"

The next day the plaintiff received from the defendant the following letter:

"MCNEAL & COMPANY

Stock and Bonds
208 South LaSalle St.
Chicago.

February 18, 1928

Mr. Henry Herman,
R. F. D. #3,
Antioch, Illinois.

Dear Sir:

Our Mr. Schimberg was up to see you yesterday and has outlined an exchange proposition whereby you are to receive $2,000 par value 6½% First Mortgage Gold Bonds for your holdings of 75 shares Central Cemetery Company of Illinois stock. We now ask that you mail in your Central Cemetery certificate, properly endorsed in blank, that is, sign your name on the line in the lower right hand corner of the assignment clause exactly as it appears on the face of the certificate but leave all other spaces blank, except to have your signature properly witnessed. We enclose a self-addressed stamped registered envelope for your convenience in forwarding this stock to us. Upon receipt of same we will promptly issue you our receipt for it and when it has been sold and the $2,000 bonds secured for your, these bonds will be, in turn, mailed to you under registered cover.

With reference to the 200 shares of Memorial Park and Mausoleum Cemetery of Philadelphia, wish to advise that it will be necessary to look for a market on this stock elsewhere which will consume a little more time, but you can rest assured that this is receiving our best attention and just as soon as we have found any purchaser for same, you will be advised further.

We appreciate the order which you have given Mr. Schimberg, and with best wishes, we remain,

Very truly yours,
MCNEAL & COMPANY
(Signed) By A. A. Harmet
AAH F" (Italics ours.)

On March 2, 1928, the defendant sent to the plaintiff the following

[illegible]

[illegible]

[illegible]

NEW YORK

The next day the [illegible]

Lecture:

[illegible]

Mr. [illegible]
R. [illegible]
Melrose, Illinois.

Dear Sir:

[illegible]

letter:

"MCNEAL & COMPANY

Stocks & Bonds
208 South LaSalle St.,
Chicago.

March 2, 1928.

Mr. Henry Herman,
R. F. D. #3,
Antioch, Illinois.

Dear Sir:
This morning we received your letter mentioning about conversation had on the 'phone with Mr. Schimberg and insisting upon delivery of the $2,000 par value of Ellis Avenue Apartments 6½'s of 1934 as agreed upon for the 73 shares of Central Cemetery Company stock.

We are enclosing bond numbers 79, 80 and 81 for $500 each and numbers 185, 186, 187 and 188 for $100 each totalling $1900.00 Ellis Avenue Apartments 6½'s of '34 on which there is accrued interest due us of $10.29.

With reference to the difference of $100 bond in this delivery to you, our Mr. Schimberg will call on you Tuesday or Wednesday of next week and we can guarantee you that we will adjust this matter to your entire satisfaction. You may withhold remitting the $10.29 accrued interest due us on these bonds and give your check to Mr. Schimberg when he calls.

Assuring you of our appreciation for this business, and with best wishes, we remain

Very truly yours,
MCNEAL & COMPANY
(Signed) By A. A. Harmet

AAH:F
ENC:" (Italics ours.)

As soon as the plaintiff received the defendant's letter of February 18 he mailed, to the latter, his stock, which was at once sold by the defendant. At the time that the defendant sold this stock he did not own or have in his possession the bonds which he afterwards turned over to the plaintiff. In fact, he does not claim to have purchased the same until March 1, 1928. In the meantime the plaintiff had been demanding of the defendant the delivery of the bonds, and on March 2, 1928, the defendant mailed the bonds to him. As a matter of fact, the defendant delivered to the plaintiff but three $500 bonds and four $100 bonds. In the letter of March 2, the defendant states:

letter:

[illegible]

Mr. Larry Hirman,
[illegible]
Hudson, Indiana.

Dear Larry:

[illegible] convey him an [illegible] upon delivery of [illegible] of land as agreed [illegible] company stock.

[illegible] and no doubt [illegible] Mills venue [illegible] interest [illegible].

[illegible] difference [illegible] delivery to you, [illegible] indemnify or hold you [illegible] adjust this. [illegible] resulting [illegible] give your [illegible] to Mr. [illegible] [illegible]

[illegible] with best wishes, [illegible]

(signed)

AMH:V
ENC: (Title [illegible])

[illegible] as soon as the plaintiff [illegible] is no reason, to the letter, [illegible] defendant. [illegible] not own or have in his possession [illegible] over to the plaintiff. [illegible] the same until March 1, [illegible] been examined by the [illegible], and on March 3, [illegible], the defendant [illegible] fact, the defendant delivered to the [illegible] and four [illegible] [illegible]

"With reference to the difference of $100 bond in this delivery to you, Our Mr. Schimberg will call on you Tuesday or Wednesday of next week and we can guarantee you that we will adjust this matter to your entire satisfaction." It appears from the records in the Cemetery company's office that the defendant guaranteed the signature of the plaintiff to the indorsement of the Cemetery company stock, although he had not seen the plaintiff sign the same and was not familiar with his signature. After a careful examination of the entire evidence bearing upon the instant contention we are satisfied that the jury were fully justified in finding that Schimberg was the agent of the defendant in the transaction with the plaintiff.

The defendant contends that his "first connection with the exchange was subsequent to the making of the contract." Our conclusion as to the first contention would be a sufficient answer to the instant one. The contention of the defendant is based upon the following assumptions: (1) that Schimberg was not defendant's agent, and (2) that the document signed by the plaintiff in Antioch, Illinois, on February 17, 1928, constituted a contract. We have already answered the first assumption. The document in question in and of itself, alone, did not constitute the contract. The contract was consummated when the defendant, in his letter of February 18, 1928, acknowledged the receipt of the document of February 17 and directed the plaintiff to send in his shares of stock in order to carry the exchange into effect. The defendant, in an effort to escape liability, not only questions the agency of Schimberg but seeks to argue that Harmet, who signed the defendant's name to the letters of February 18 and March 2, 1928, had not the authority to bind the defendant by certain statements in the same. It is somewhat difficult to speak in temperate terms of the attempts of the defendant to avoid liability for the fraud practiced upon the unfortunate

"With reference to the [illegible] to you, our Mr. [illegible] of next week [illegible] matter to your [illegible] in the Cemetery company's [illegible] signature of the plaintiff [illegible] although he had not seen the [illegible] familiar with his signature. [illegible] entire evidence bearing upon the [illegible] that the jury were fully justified [illegible] the words of the defendant [illegible]

The defendant [illegible] the exchange [illegible] conclusion as to the first [illegible] to the instant case [illegible] the following [illegible] agent, and (a) in the [illegible] Illinois, on February 17, 1888, [illegible] already accepted the first [illegible] in and of itself, alone, [illegible] tract [illegible] commenced [illegible], in [illegible] 18, 1888, acknowledged the [illegible] and [illegible] the plaintiff [illegible] to carry the exchange [illegible] to escape liability, [illegible] seeks [illegible] letters of [illegible] with the [illegible] difficult [illegible] and to avoid liability [illegible]

plaintiff. As to the last contention, it is sufficient to say that the defendant, when upon the stand, was compelled to admit the agency of Harmet. He testified that Harmet was in his employ and that he did part of the correspondence of the defendant. He was further forced to admit that Harmet, when he wrote the letter of February 18, 1928, was conducting the business of the defendant. Shown the letters addressed to the plaintiff and asked if he saw them before they were mailed, he made the following answer: "A. I don't recall having seen them." The evidence shows that the defendant received the benefit of the misrepresentation made to the plaintiff. He sold the plaintiff's stock and received the money for the same. He claims to have purchased the bonds of Krisan on March 1 and it was he who sent the bonds to the plaintiff. All the facts and circumstances in the case show plainly that Schimberg was the defendant's agent and that the contract in question was a contract between the plaintiff and the defendant.

The defendant next contends that "the evidence shows no actionable false representations by either Schimberg or the defendant as to any security behind the bonds." This contention, like the others, is devoid of merit. Schimberg told the plaintiff that he would give him "gold bonds, first mortgage bonds here in Chicago." In the defendant's letter of February 18, 1928, he states: "You (plaintiff) are to receive $2,000 par value 6½% First Mortgage Gold Bonds for your holdings of 75 shares Central Cemetery Company of Illinois stock." At the top of the bonds given to the plaintiff appears, in bold type, the following: "Secured By First Mortgage." (Italics ours.) It is undisputed that at the time the bonds were executed, as well as at the time the defendant delivered them to the plaintiff, there were two trust deeds, each for the principal sum of $55,000, dated and recorded prior to the trust deed securing the bonds; that the two prior trust deeds were unreleased at the time of

plaintiff. [illegible]

that the [illegible] support, who [illegible]

the [illegible] of [illegible]. [illegible]

and it, [illegible] part of the [illegible] of the [illegible].

was further forced to [illegible] the [illegible], and he [illegible] the [illegible] of February 17, 1967, and [illegible] the [illegible]

shown the [illegible]

then before they [illegible] "[illegible]

I don't really [illegible]

defendant really [illegible] to the plaintiff. He said the [illegible] the money for the [illegible]. [illegible] March 1 and [illegible] the facts and circumstances [illegible] the plaintiff. [illegible] was the defendant's [illegible] and [illegible] a contract between the plaintiff and the defendant.

The defendant most [illegible] no reasonable false representations [illegible] the defendant as to any [illegible] behind the [illegible] others, to divest of [illegible] that he would give him "gold bonds, [illegible] in "[illegible]." In the defendant's letter [illegible] (plaintiff) are to [illegible] "[illegible] bonds for your building of 75 [illegible] Illinois stock." [illegible] the top of the [illegible] appears, in old style, the following: [illegible] (italics mine). [illegible] executed, as well as [illegible] no delivery [illegible] the plaintiff, there were [illegible] for the [illegible] $86,000, these [illegible] the [illegible] bonds. But the [illegible] the time of

the transaction in question, as well as at the time of the trial of this cause, and that the trust deed given to secure the bonds was a third mortgage. The defendant argues, however, that the evidence does not show that either Schimberg or the defendant knew that the bonds were not secured by a first mortgage. While it is necessary, in a case of this kind, to prove scienter, nevertheless, that fact, like any other fact, may be proved by direct and circumstantial evidence. It is for the jury to determine, from all the facts and circumstances in the case, whether the defendant knew the truth when he and his agent made the false statements. As has been often stated, such knowledge may be a just inference from other facts, though not directly proved. The defendant, doing business as "McNeal & Company," held himself out to the world as engaged in the stocks and bonds business. He had an office on one of the main streets of the downtown part of Chicago. He was not a member of any exchange and he dealt in what are called "unlisted securities." As we have heretofore stated, Schimberg told the plaintiff that the bonds were first mortgage bonds; the defendant, in his letter to the plaintiff, stated that they were first mortgage bonds, and on the face of the bonds that the defendant turned over to the plaintiff prominently appeared the statement that the bonds were secured by a first mortgage. Would an honest dealer in bonds represent to a customer that bonds were secured by a first mortgage, without first making inquiries on the subject? Can a dealer represent to a customer that a bond is secured by a first mortgage, and then hide behind the plea that he did not know that the bond was actually secured by only a third mortgage? The jury had a right to infer from all the facts and circumstances in this case that the defendant knew that this representation was false. The manner in which the defendant sought to evade the agency of Schimberg and Harmet also tended to throw light upon the honesty

the trade [illegible] in [illegible]
of this owner, [illegible] [illegible]
was a land [illegible]. [illegible]
evidence [illegible] [illegible]
that the bond [illegible] [illegible]
necessary, in [illegible] of this kind, to [illegible]
that fact, like any other fact, [illegible]
essential evidence. It is not the [illegible]
facts and [illegible] in the [illegible]
truth when [illegible] and his agent [illegible]
often [illegible], such as [illegible]
facts, that [illegible] proved. The [illegible]
"Medical Company" [illegible]
stocks and [illegible] medicines. [illegible]
[illegible] of the [illegible]
[illegible] may
be [illegible] called "[illegible]"
[illegible] said
[illegible] mortgage bonds [illegible] [illegible]
that they were first mortgage [illegible]
that the [illegible] [illegible]
the statement in the [illegible]
on [illegible] [illegible]
secure by a first mortgage, [illegible]
subject. [illegible]
by a first mortgage, [illegible]
[illegible]
the jury [illegible] [illegible]
in this case [illegible]
[illegible]. The [illegible]
of [illegible] [illegible]

of the defendant in the transaction. If the transaction was an honest one, why should the defendant seek to hide behind Schimberg and Harmet? Schimberg told the plaintiff that the bonds were a much better investment for the latter than his stock. Harmet admitted that at the time of the transaction with the plaintiff he could buy the bonds on the market at a large discount. The argument of the defendant that the statements of Schimberg and the defendant that the bonds were first mortgage bonds was nothing more than "ordinary and permissible puffing," is an idle one and requires no answer.

The defendant next contends that "the plaintiff's damages, if any, are limited to the difference between the value of the stock and that of the bonds at the time of the exchange." The bonds in question were a part of an issue totaling $110,000. They were subject to two prior dated and recorded trust deeds, unreleased, conveying the same property conveyed in the trust deed securing the bonds, each aggregating $55,000. The total mortgage indebtedness upon the property in question was $220,000, and the gross annual income from the premises was $17,000. The evidence shows that there was a default in the payment of interest on the bonds in question and that no principal or interest had been paid upon the bonds. Harmet, a witness for the defendant, testified that the defendant bought the bonds in question on March 2, 1928, from George Krisan for $1,310.83. This was the only evidence introduced by the defendant on the subject of the value of the bonds. Krisan was not produced as a witness. Harmet sought in every way to aid the defendant. He testified that Schimberg was a trader on his own account and was not in the employ of the defendant; and he tried also to show that the defendant had no connection with the transaction in question. The jury were fully justified in disbelieving Harmet's testimony as to the Krisan transaction and they were further justified in finding that

of the de[illegible]
an expert has, any [illegible]
and [illegible] coining [illegible]
much better investment [illegible]
admitted [illegible] at the time [illegible]
he could [illegible] on the [illegible]
argument of the [illegible]
the defendants that the [illegible]
more than ordinarily one permissible [illegible]
requires no answer.

The defendant next contends that [illegible]
if any, [illegible] limited [illegible]
and that [illegible] time of [illegible]
question was [illegible] part of [illegible]
jects to two prior [illegible]
veying the same property conveyed [illegible]
bonds, each [illegible]
upon the property in [illegible]
income from the premises [illegible]
there was a default in the payment of interest [illegible] ques-
tion and that no principal or interest has been paid [illegible]
Barnet, a witness for the defendant, testified [illegible]
bought the bonds in question on March 2, 1932, [illegible]
for $1,517.63. [illegible] plaint-
iff on the subject of the value [illegible] produced
as a witness. Barnet sought [illegible]
testified [illegible] not
in the employ of the defendant [illegible]
defendant had no connection with [illegible] The
jury were fully justified in [illegible]
[illegible]

the bonds in question were worthless. If the bonds had any substantial value the defendant could have proven that fact by credible evidence. He failed to do so.

The defendant next contends that "no basis is found in the evidence for the plaintiff's instructions directing the jury to include exemplary damages if they found the issues in his favor." It would be a sufficient answer to this contention to say that the jury, by its verdict, did not award exemplary damages. However, the giving of the instructions in question was warranted under the facts and circumstances of this case, as it is apparent that the representation about the bonds was wantonly and designedly made by the defendant for the purpose of inducing the plaintiff to make the exchange.

The defendant next contends that "the amount by which the judgment exceeds the verdict, being apparently allowed as interest, is erroneous because of the jury's failure to fix the date from which interest should accrue." There is no merit in this contention. A verdict may be construed by the court with reference to the pleadings and evidence in the record, and it was a simple matter for the trial court to ascertain from the evidence the date of the transaction, about which there is no dispute, and to compute the amount of interest on $1,500.

Transactions like the instant one are becoming too common, and it would be a serious commentary upon justice if the defendant could obtain the valuable stock of the plaintiff through a false and fraudulent representation and escape the consequences of such conduct. The judgment of the Circuit court of Cook county is a just one and it should be and it is affirmed.

AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

the bonds in [illegible]
essential [illegible]
evidence. [illegible]

The [illegible]
the evidence for the plaintiff [illegible]
to include [illegible]
it would be [illegible]
jury, by its verdict, [illegible]
the giving of the [illegible]
[illegible]
representation [illegible]
the defendant, [illegible]
exchange.

The defendant [illegible]
judgment [illegible]
in evidence [illegible] Jury's [illegible]
interest [illegible]
verdict [illegible]
and evidence [illegible]
court to [illegible]
about which [illegible]
on it.

[illegible]
and is [illegible]
could [illegible]
fraudulent [illegible]
duct. [illegible]
and it should be [illegible]

[illegible]

35147

IN RE PETITION OF GEORGE KIT, to be Discharged Under the Insolvent Debtors' Act.

FRANK BRADY, Administrator of the Estate of NELLIE BRADY, Deceased,
(Respondent) Appellee.

APPEAL FROM COUNTY COURT OF COOK COUNTY.

147

263 I.A. 651

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Frank Brady, Administrator of the Estate of Nellie Brady, Deceased, sued George Kit in an action on the case, in the Circuit court of Cook county. There was a trial before the court, with a jury, and a verdict was returned finding the defendant guilty and assessing the plaintiff's damages at the sum of $1,500. Judgment was entered upon the verdict. Thereafter the defendant (hereinafter called the petitioner) petitioned the County court of Cook county to release him from imprisonment under a writ of capias ad satisfaciendum issued from the Circuit court upon the judgment. Upon the hearing in the County court the petitioner claimed that malice was not the gist of the action in said cause, and he filed a schedule under the provisions of the Insolvent Debtors' Act. The petitioner offered in evidence the declaration in the cause; also the instructions given to the jury and the special finding returned by the jury. The trial judge, in the proceedings in the County court, entered an order finding that malice was the gist of the action in the Circuit court and remanding the petitioner to the custody of the sheriff. From this order the petitioner has appealed.

The petitioner alleges that the trial court erred in finding that malice was the gist of the action in the Circuit court. The third count of the declaration alleges (inter alia) that the

48127

IN RE PETITION OF CHARLES [illegible],
to be discharged under the
Insolvent Debtors' Act.

FRANK [illegible], Administrator of
the Estate of [illegible] BRADY,
Deceased,
(Respondent) Appellee.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

[illegible], administrator [illegible] Brady, Deceased, [illegible] Circuit court of [illegible] county, [illegible] with a jury, and [illegible] and asked [illegible] plaintiff's [illegible] ment [illegible] instituted [illegible] county to relieve [illegible] malicious or malicious wrong [illegible] judgment. Upon the hearing in the [illegible] court [illegible] malice was not the gist [illegible] a schedule [illegible] Insolvent Debtors' Act. The petitioner [illegible] the instructions [illegible] by the jury. [illegible] county court, [illegible] action in [illegible]

The [illegible] finding that malice was the [illegible]. The 2nd count of the [illegible] wilful [illegible]

petitioner "operated and controlled his said automobile in a westerly direction in said Western avenue, with an entire absence of care and with complete disregard for the rights of the plaintiff and others using said Western avenue, and with complete disregard for the signal lights then giving the right of way to northerly and southerly traffic; and then and there so wilfully, wantonly and maliciously, and with an intent and a willingness to injure the plaintiff's intestate and run her down with great force and terrific violence drove and ran into, upon and against the plaintiff's intestate and then and there the plaintiff avers that his said intestate was with great force thrown against the street, pavement and other hard substances there by means and as a result of the defendant's wilful and wanton conduct the plaintiff's intestate was seriously and grievously wounded, injured, bruised, internally and externally, that as a result thereof she died on, to-wit: the 24th day of December, A. D. 1928." The court gave (inter alia) the following instructions: (1) "The court instructs the jury that what is known as wilful and wanton misconduct is such conduct as amounts to an intentional disregard of a known duty necessary to the safety of a person or property of another and entire absence of care for the life, person, or property of others such as exhibits a conscious indifference to consequences." (2) "The court instructs the jury, as a matter of law, that a wilful or wanton act may be done with deliberate intent, or it may be done without a deliberate intent, but with such an entire absence of care as exhibits a conscious indifference to the consequences or a willingness to inflict injury." The court also submitted to the jury the following interrogatory: "Did the conduct of the defendant, George Kit, at and before the time of the injury in question, as shown by the evidence, under the court's instruction, amount to wilfulness, as defined in the court's

petitioner [illegible] direction in said [illegible] and with [illegible] [illegible] the signal light [illegible] [illegible] contrary traffic [illegible] [illegible] malicously, [illegible] plaintiff's [illegible] drove [illegible] then and there [illegible] great force [illegible] [illegible] and wanton conduct [illegible] grievously wounded, injured, bruised, [illegible] that as a result [illegible] December, A. D. 1929." [illegible] instructions: (1) "[illegible] as willful and wanton misconduct [illegible] intentional disregard of [illegible] a person or property, of such [illegible] life, person, or property of [illegible] indifference to consequences." (2) "[illegible] as a matter of law, that a [illegible] deliberate intent, or [illegible] but with such [illegible] indifference [illegible] the court also [illegible] "The [illegible] time of the injury in question, [illegible] court's instruction, [illegible]

instruction?" To this interrogatory the jury answered, "Yes."

Malice was the gist of the charge in the third count of the plaintiff's declaration. That count charges a tort amounting to an assault to commit a bodily injury, and the plaintiff could recover only by proving that the petitioner intentionally ran down the plaintiff's intestate. It charges a wanton and wilful violation of the law. The jury, by their special finding, found that the conduct of the petitioner at and before the time of the injury in question amounted to wilfulness. The Century dictionary defines "wilfully:" "By design; with set purpose; intentionally." In United States v. Reed, 86 Fed. 308, 312, the court said: "By 'malice' is not necessarily meant in the law a malignant spirit, a malignant intention to produce a particular evil. If a man intentionally does a wrongful act, an act which he knows is likely to injure another, that in law is malice; it is the willful purpose, the willful doing of an act which he knows is liable to injure another, regardless of the consequences. That is malice, although the man may not have had a specific intention to hurt a particular individual, or crew. So, if a man willfully neglects a known obligation, with the same reckless disregard of the consequences, that is malicious conduct in the sense of the law." In Hull v. Seaboard Air Line Ry., 76 S. C. 278, 281, the court said: "Each of the words, wantonness, wilfulness and recklessness, embodies the element of malice, either express or implied, and are in law substantially the equivalent of each other, in so far as they give rise to an action based upon punitive damages." A "wilful" act is one that is done knowingly and purposely, with the direct object in view of injuring another. (Hazle v. Southern Pac. Co., 173 Fed. 431.) Wilfulness imports premeditation. (See Fromm v. Seyller, 245 Ill. App. 392, 396.) In the instant case the special finding of the jury is equivalent to a finding that the conduct of the petitioner

[illegible]

[illegible]

of the [illegible] tort.

[illegible]

recover only by proving that the [illegible]

the plaintiff's injuries. [illegible]

tion of the law. [illegible]

the conduct of the defendant [illegible]

in question [illegible]

"wilfully": "By design; [illegible]

United States v. Reed, [illegible]

'malice' is not necessarily [illegible]

a malicious intention to [illegible]

intentionally [illegible]

to injure another, [illegible]

the wilful doing of an act [illegible]

another, [illegible]

the bad way [illegible]

disclosed, or [illegible] wilfully [illegible]

tion, with the [illegible]

malicious conduct in [illegible]

Air Line Ry., [illegible]

words, [illegible]

of malice, [illegible]

the equivalent of [illegible]

action based upon positive [illegible]

done knowingly [illegible]

injurious act. (Davis v. [illegible]

[illegible]

Ann. Cas. [illegible]

[illegible]

was malicious. (See Fromm v. Seyller, supra; Kaplan v. Williams, 245 Ill. App. 542, 546; Mantske v. Rhutassel, 248 Ill. App. 492, 494; Buszin v. Bestmann, 246 Ill. App. 166, 168; In re Petition of Majewski, 249 Ill. App. 641.)

The petitioner contends that he testified in the proceeding in the County court "that he did not know Nellie Brady, the deceased, the party struck by his automobile in the case in which the capias ad satisfaciendum issued, before the accident, and that he had never seen her before the time of the accident," and that this testimony was undisputed and establishes "that he did not have the intention to injure the deceased required as one of the elements of the term 'malice,' as used in the Insolvent Debtors' Act." At the hearing in the County court the petitioner was allowed to testify, over the objection of the respondent, that he did not know the deceased "before the accident that occurred on the 23rd of December, 1928," and that he had never seen her "before the time of the accident." The objection to this evidence should have been sustained. As we have heretofore stated, the jury, by the special finding, found that the conduct of the petitioner was malicious, and until the judgment of the Circuit court is reversed it is binding upon the parties to it. The proper place for the petitioner to have made his defense, if he had one, was in the Circuit court. In any event, the testimony that he did not know the deceased and had never seen her before the time of the accident, would not prove that his conduct at the time in question was not malicious.

After a careful consideration of the record in this case we are satisfied that there is no merit in the appeal, and the judgment of the County court of Cook county is affirmed.

AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

[illegible]

[illegible]

35156

JAMES L. KEARNS, for use of
JAMES F. MURRAY,
(Plaintiff),
Appellee,

v.

FRANKLIN COMPANY, a corporation,
(Garnishee),
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

263 I.A. 651

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On December 12, 1930, James F. Murray obtained a judgment by confession for $102.50, in the Municipal Court of Chicago, against James L. Kearns, and on November 6, 1930, in another case in the same court he obtained a judgment by confession for $205, against the same party. In each case execution was returned, "No property found and no part satisfied." Thereafter, in each case, garnishment proceedings were commenced against the Franklin Company, a corporation, appellant. The writ in the first case was served upon the garnishee on December 17, 1930, and the writ in the second case was served on November 25, 1930. The garnishee answered in each case, "No funds," and by stipulation the two answers were considered filed as of January 13, 1931. The answers were traversed and upon the stipulation of the parties and upon the order of the court the two cases were consolidated into one, and by agreement the cause was submitted to the court and there were findings against the garnishee, in the two cases consolidated, in the aggregate sum of $322.70. The garnishee has appealed from the judgment.

The garnishee concedes that there is no controversy as to the facts, and states that the only question involved in the appeal is one of law, viz: "Where an employee who works on a strictly commission basis and whose employer advances him sums of

money in regular weekly amounts which advancements are in the nature of a drawing account; are these advancements so made after the service of the garnishment writ subject to garnishment?" The garnishee insists that such "advancements" are not subject to garnishment. The plaintiff contends that the question of law to be decided is: "Where, upon service of garnishment process upon the garnishee, who also is a creditor of the judgment debtor, garnishee does not adjust its accounts with the judgment debtor, but after service of process and before answer in which garnishee answers 'no funds,' garnishee pays to judgment debtor a sum each week equalling in amount the sum which judgment debtor has received from garnishee for more than sixty weeks prior to garnishment proceedings, are such payments made between date of service of garnishment process and filing of answer subject to garnishment?" The evidence shows that the employee, Kearns, had been employed by the garnishee as a salesman, for five years, on a commission basis and that it had been the practice for a long time to pay him $100 every week. Between the time of the service of the summonses upon the garnishee and the filing of its answers the garnishee continued to pay Kearns regularly, and the aggregate of the payments was $725. The bookkeeper of the garnishee testified that at the time of the service of the first writ Kearns was indebted to the garnishee in excess of $1,000, and at the time of the service of the second writ he was indebted to the garnishee $1,193.97, and that the payments made to Kearns, after the service of the writs, were advances against future commissions to be earned by him. The garnishee, after the service of the writs, made no attempt to adjust the alleged account between itself and Kearns and there was no question of exemptions raised. A like state of facts was before this division of the court in the recent case of Baird v. Luse-Stevenson Co., 262 Ill. App. 547, and it was there held that the garnishee was liable, and as the

authorities bearing upon the question are there reviewed, it is unnecessary for us to repeat what was said in that opinion.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

35189

JAMES H. HOOPER,
Plaintiff in Error,

v.

H. LEOPOLD SPITALNY,
Defendant in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff, James H. Hooper, sued the defendant, H. Leopold Spitalny, to recover $200 rent claimed to be due him as the owner of certain real estate. On July 31, 1930, there was a trial by the court, without a jury, and a finding and judgment in plaintiff's favor for $275. On February 18, 1931, the defendant filed a verified petition in which he prayed that the judgment of July 31, 1930, be vacated. Afterwards, on February 21, 1931, the court entered an order sustaining the defendant's motion and vacating the judgment of July 31, 1930, and plaintiff has sued out this writ of error to reverse the judgment order of February 21, 1931.

This case is similar in all of its essential aspects with James H. Hooper v. . . . Foreman, Gen. No. 35201, in which the opinion has been filed this day, and we refer to that opinion for our reasons in affirming the judgment in the instant case.

The judgment order of the Municipal Court of Chicago of February 21, 1931, is affirmed.

JUDGMENT ORDER DATED FEBRUARY 21, 1931, AFFIRMED.

Gridley, P. J., and Herner, J., concur.

35201

JAMES H. HOOPER,
Plaintiff in Error,

v.

W. D. FOREMAN,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

263 I.A. 652

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff, James H. Hooper, commenced an action in the Municipal Court of Chicago against the defendant, W. D. Foreman, to recover $250 alleged to be due him for rent. The plaintiff alleged, in his statement of claim, that in February, 1926, the Broadway-Sheridan Building Corporation recovered a judgment in the Municipal Court of Chicago against Celle Becker, the owner of the apartment building in question, for $725; that there was a sale by the bailiff of that court and that by virtue of such sale the plaintiff became the owner of the premises; and that the defendant was a tenant occupying one of the apartments and was notified by the plaintiff to thereafter pay the rent to him and that he has failed to do so. The defendant filed an affidavit of merits in which he sets up, inter alia, that Celle Becker was and is the owner of the premises described in the plaintiff's statement of claim; that the defendant occupies the apartment in the premises in question pursuant to a lease entered into by and between Celle Becker and the defendant, which lease is still in force and effect, and that during the entire period of the same he has paid the rent to Celle Becker and to no other person; that he has had no notice of an assignment of the rights of the said Celle Becker in and to said lease, nor has the said Celle Becker directed or authorized the payment of said rent to

the plaintiff or any other person; that the plaintiff has acquired no rights whatsoever in and to said property whereby to entitle him to obtain possession of said property or to collect the rents therefor by reason of his alleged purchase of said property at said alleged bailiff's sale; that said sale, if held, was void and of no force and effect whatsoever in that there was no notice to said Celle Becker of any kind whatsoever and no appraisement of her homestead rights in and to said property, and, further, that said alleged purchase was made upon a bid for less than $1000, contrary to the statute in such cases made and provided. Thereafter, on October 8, 1929, the cause was reached, in regular course, for trial and the plaintiff failing to appear his suit was dismissed for want of prosecution at his costs. The next day, October 9, 1929, on motion of the plaintiff and without notice to the defendant there was an order entered, vacating the order dismissing the suit for want of prosecution. On July 31, 1930, the following order was entered:

> "Now comes the plaintiff in this cause, the defendant being absent and not represented, and thereupon this cause comes on in regular course for trial before the Court without a jury, and the Court having heard the evidence and the arguments of counsel, and being fully advised in the premises, enters the following finding to-wit:
>
> > "THE COURT FINDS THE ISSUES AGAINST THE DEFENDANT, W. L. FOREMAN, AND ASSESSES THE PLAINTIFF'S DAMAGES AT THE SUM OF TWO HUNDRED FIFTY and 00/100 DOLLARS ($250.00).
>
> "This cause coming on for further proceedings herein it is considered by the Court that the plaintiff have judgment on the finding herein and that the plaintiff have and recover of and from the defendant, W. L. Foreman the damages of the plaintiff amounting to the sum of Two Hundred Fifty and 00/100 Dollars ($250.00) in form as aforesaid assessed, together with the costs by the plaintiff herein expended and that execution issue therefor."

On February 21, 1931, the defendant filed a motion to set aside the order of July 31, 1930, and to expunge from the record of the court all orders entered subsequent to the order of October 8, 1929, and

[illegible]

was entered:

> "[illegible] the plaintiff in [illegible] cause, who [illegible] being absent and not represented, [illegible] cause on in regular order. Mr. [illegible] a jury, and the court having [illegible] [illegible] motion of counsel, the [illegible] enters the following finding, to-wit:
>
> "THE COURT FIND[illegible] [illegible]
>
> "While cause coming on [illegible] it is considered by the court that the plaintiff have judgment on the finding herein [illegible] that the plaintiff have [illegible] and from the defendant. [illegible] plaintiff's mandatory in the sum of two [illegible] Bollore ([illegible]) in form as [illegible] the order by the [illegible] [illegible] issue therefor."

On February 21, 1913, the [illegible] order of July 21, 1910, [illegible] all orders entered subsequent to the order of [illegible] 1, 1910.

in support of the motion filed a verified petition and affidavit and also a copy of Rule 34 of the Municipal court. The petition recites, inter alia, "that after this cause was dismissed for want of prosecution, on October 8, 1929, no notice of any kind was received, nor was there any knowledge ever had by this petitioner of the proceedings subsequent thereto, on, to-wit, the 9th day of October, A. D. 1929, vacating the said order of dismissal for want of prosecution and of any orders entered thereafter; * * * that the orders subsequent to the order of dismissal for want of prosecution on, to-wit, the 8th day of October, A.D. 1928, were improperly and unlawfully entered and without authority of any right whatsoever, in violation of the rules of this Court, and prays that all entries herein commencing on October 9, 1929, being the order vacating the order of dismissal of the 8th day of October, 1929, be expunged from the records of this court and said cause stand dismissed for want of prosecution in pursuance of order entered on October 8, 1929." The petition also set up that the defendant has a good and meritorious defense to the whole of the plaintiff's demand, as set forth in the affidavit of merits. Rule 34 of the Municipal Court of Chicago is as follows:

> "Notice to the opposite party must be in writing, stating the motion, time and place of hearing, and designating the judge before whom the same is to be made. Notice of motion for leave to amend pleading or to file any petition, pleading or other document must be accompanied by a copy of the paper proposed to be filed.
>
> "Notice of all motions together with copies of all papers in support thereof must be served upon the opposite party or his attorney of record in any of the following methods:
>
> "(a) By delivering a copy thereof to the attorney of record for the opposite party before 4 P. M. of the business day next preceding the day mentioned in the notice for calling up the motion, or by leaving a copy thereof at his office with some person in charge thereof on his behalf. Such service on Saturday must be had before twelve o'clock noon.
>
> "(b) If no attorney appears of record, then by delivering a copy thereof to the opposite party, as provided in

[illegible]

"Notice to the opposite party must be [illegible] stating [illegible] motion, time and place [illegible] the judge before whom the [illegible] is to be made. Notice of motion for leave to amend [illegible] or other document must be accompanied by a copy of the paper proposed to be filed.

"Notice of all motions [illegible] with copies of all papers in an [illegible] must be served upon the opposite party or his attorney [illegible] time [illegible] mentioned.

"[illegible] a copy thereof to the attorney of record for the [illegible] party before [illegible] of the motion day next preceding the day mentioned in the notice for filing the motion, [illegible] Provided [illegible] with some person in charge thereof on the premises [illegible] attorney or [illegible] before twelve o'clock noon.

(2) [illegible] to [illegible] citizens [illegible] to the [illegible] provision [illegible]

Section 16 of the Practice Act, at least twenty-four hours before the motion is to be heard.

"(c) By depositing in the mail copies thereof, properly addressed to the attorney of the opposite party, or to the party if he have no attorney of record at least thirty-six hours before the motion is to be called up for hearing; in computing such time, Sundays and legal holidays shall be excluded. When notice is given by mail the motion on presentation to the court must be accompanied by the affidavit of the person who mailed the notice stating the time and place of mailing, together with the complete address appearing on the envelope.

"No motion will be heard or order made in any case without notice to the opposite party where an appearance of such party has been entered, except when a cause is regularly reached for trial or hearing, either on a date for which it has been set or when assigned from the jury calendar."

After a hearing of the petition the trial court entered the order of February 21, 1931, which vacated the judgment entered on July 31, 1930. The court ordered that the case be set down for trial on April 9, 1931. The plaintiff sues out this writ of error to reverse the judgment order of February 21, 1931.

The plaintiff contends that the trial court erred in entering the order of February 21, 1931. There is no merit in this contention. Furthermore, in Hooper v. Becker et al., 254 Ill. App. 606, we held that Hooper's deed to the property in question was void, and a petition for certiorari seeking to reverse the judgment of this court was denied by the Supreme court at the October term, 1929. In another opinion, filed by this court on October 9, 1931, Celle Becker v. James H. Hooper, Gen. No. 34897, we give a history of certain litigation brought by Hooper affecting this same property. From the records of this court we learn that the plaintiff is still harrassing the tenants of this building with suits for rent. These suits are without a semblance of merit and the plaintiff, who is entirely familiar with the aforesaid decisions, should cease to further prosecute such suits.

The judgment order of the Municipal Court of Chicago of February 21, 1931, is affirmed.

JUDGMENT ORDER DATED FEBRUARY 21, 1931, AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

35212

LANDFIELD-KUPFER PRINTING CO., a Corporation, Appellant,	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	)	
SIDNEY SMITH, Appellee.	)	263 Ill. App. 552

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Landfield-Kupfer Printing Co., a corporation, plaintiff, sued Sidney Smith, defendant, in an action in assumpsit. The declaration consisted of five counts. To the declaration the defendant filed a general demurrer and six "causes of demurrer to the said declaration and each count thereof." The plaintiff insists that the pleadings of the defendant consisted of a general demurrer and six special demurrers. The defendant contends that the six "causes of demurrer" go to the substance of the declaration and that therefore "the demurrer is a general demurrer which sets out with particularity the matters of substance in which the declaration is defective." The trial court entered the following order: "This cause having come on to be heard upon the demurrers heretofore filed to the declaration herein, and the court having read said declaration and the demurrers and having heard the arguments of counsel and being fully advised in the premises, doth order, adjudge and decree that the general demurrer and special causes of demurrer numbered respectively 1, 3, 5 and 6, be and the same are hereby overruled. It is further ordered, adjudged and decreed that special causes of demurrer numbered respectively 2 and 4, filed by the defendant herein to the said declaration, be and the same are hereby sustained. Plaintiff electing to stand

by its declaration, it is ordered that judgment of nil capiat and for costs be entered against the plaintiff and in favor of defendant." From this judgment the plaintiff has appealed.

The facts alleged in the declaration, so far as they are material to a decision of the instant appeal, are: "The plaintiff and defendant on March 3, 1918 entered into a contract under seal in which the defendant promised (1) to furnish the plaintiff not less than 100 cartoons known as the 'Gumps' and also one colored cartoon; (2) to give the plaintiff the exclusive right to print, publish, manufacture and sell 'Gump' cartoon books for a period of five years; (3) to permit his picture to be printed on the cover of the books to be published; (4) to have the 'Gump' books issued by the plaintiff copyrighted; (5) to furnish to the plaintiff the name of every paper publishing the 'Gump' cartoons; (6) to furnish to the plaintiff upon request 75 cartoons annually for the publication of new books. As consideration for the promises made by the defendant the plaintiff promised (1) to print, publish, manufacture and sell the 'Gump' cartoon books at its own expense; (2) to pay defendant a royalty on each book sold; (3) to account to the defendant for all books printed and sold; (4) to furnish 100 free copies of books of the 'Gump' cartoons to defendant; (5) to keep accurate books of account and give defendant access thereto; (6) to publish annually a new book of the 'Gump' cartoons; (7) to guarantee to manufacture and sell not less than 25,000 books per year after the first year." It appears from the declaration that various terms of this contract were modified by agreements under seal in particulars that are not important to the instant controversy. The declaration further alleges that on April 12, 1920, "the plaintiff and defendant entered into an agreement to extend the contracts hereinabove set forth for a period of five years

by the distribution, it [illegible] for costs to enforced against the plaintiff [illegible] and." From this judgment the plaintiff [illegible].

The [illegible] in the [illegible] material to [illegible] and defendant [illegible] in which the [illegible] less than [illegible] cartoons [illegible] cartoon; (2) to give the plaintiff the exclusive right of [illegible] publish, manufacture or sell "Gump" cartoons only to a period of five years; (3) to permit the plaintiff [illegible] of the books to be published [illegible] by the plaintiff [illegible] name of every [illegible] to the plaintiff upon request [illegible] of new books. [illegible] the plaintiff produced (1) a [illegible] 'Gump' cartoon book [illegible] on each book sold; (2) [illegible] printed and sold; (3) [illegible] cartoons [illegible] defendant [illegible] 'Gump' cartoons [illegible] than $8,000 [illegible] the decisiveness of a verdict [illegible] agreement [illegible] instant controversy. The certificate [illegible] 12, 1922, "the plaintiff [illegible] extend the customary hereinbefore [illegible]

ending March 7, 1928," and that the defendant acknowledged this agreement in writing. The two "special causes of demurrer" sustained by the trial court read as follows: "2. That the alleged agreement entered into on April 12, 1920, as set forth and alleged in said declaration and in each count thereof, does not obligate the defendant at law for the reason that no consideration passed from the plaintiff to the defendant for the undertakings contained in said alleged agreement; that said alleged agreement was not supported by any good and valuable consideration and that the promise of the said defendant in said alleged agreement was a mere naked promise without any good and valuable consideration therefor;" and "4. That the said alleged agreement entered into between plaintiff and defendant on April 12, 1920, as set forth and alleged in said declaration and each count thereof, does not obligate the defendant at law for the reason that said alleged agreement is a parol contract, while the said original contract dated March 8, 1918, is a document under seal, the terms of which cannot be varied or altered by a parol agreement, but only by a document of like dignity."

The plaintiff contends that the judgment must be reversed regardless of the question as to whether or not the alleged agreement of April 12 was a valid and binding contract between the parties. This contention is a meritorious one. The original contract in the case was entered into on March 8, 1918, and it was to run for a period of five years, or until March 7, 1923. In accordance with its terms the defendant agreed to supply 75 cartoons yearly upon demand. The declaration alleges demands by the plaintiff and refusals of the defendant to supply the cartoons in March, 1921, and in January, 1922. These refusals constituted breaches of the original contract, at least. It is the rule in this state that the inclusion of matters

in a document upon which a statement is not qualified or reserved does not make the declaration bad. It is enough if facts stated and the pleading is sufficient. Mere failure, or the failure upon which the plaintiff's right of recovery is dependent, is not a defense. The defendant, in his brief and on oral argument, contends that the plaintiff has a right of action on the original contract of May 8, 1913, and that the judgment should be reversed and the cause remanded.

The record does not disclose when or where the plaintiff and the third party defendant (Gerald Cooper) entered into the contract. They do not appear to be natural persons. In fact, they appear to only a part of the claim of the plaintiff. Therefore, the trial court overruled the general demurrer. They are not proper parties for they have no a on matter of substance. "Any claim here presented."

The judgment of the Superior Court is affirmed; judgment is reversed, and the cause is remanded to a different judge of the trial court to overrule the demurrer "by the trial judge" [illegible] and for further proceedings not inconsistent with this opinion.

[illegible]

Shipley, J., Jj., and Horner, J., concur.

35228

WILLIAM H. BROWN & CO.,
a corporation,
Appellant,

v.

JOHN EBERSON, BEATRICE
EBERSON et al.,
Appellees.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

263 I.A. 652[3]

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The complainant, William H. Brown & Company, a corporation, filed its bill to foreclose a mechanic's lien against the property of the defendants, John Eberson, Beatrice Eberson et al., for a balance alleged to be due under a contract for the shoring and underpinningof the south wall of the residence located thereon. The cause was referred to a master in chancery, who heard evidence and filed a report finding that the complainant was not entitled to a mechanic's lien and recommending that the bill be dismissed for want of equity. The chancellor overruled the exceptions to the master's report and entered a decree that the bill of complaint be dismissed for want of equity at complainant's costs. The complainant has appealed.

The master found, inter alia,

"1. The complainant, William H. Brown & Co., is a corporation duly organized and existing under the laws of the State of Illinois, with its principal place of business in the City of Chicago, County of Cook and State of Illinois, engaged in the occupation of house-movers, shoring and engineering contractors.

"2. On August 4, 1927, the complainant entered into a written contract with the defendant John Eberson, with the knowledge and consent of the defendant Beatrice Eberson, his wife, for the shoring and under-pinning of the South wall of their two-story brick residence, located at 7315 South Shore Drive, Chicago, Illinois, and more particularly described as

WILLIAM H. [illegible] & CO.,
a corporation,
appellant,

v.

JOHN [illegible], [illegible]
[illegible] et al.,
appellees.

Mr. JUSTICE [illegible] delivered the opinion of the court:

The complainant, William H. Brown & Company, a corporation, filed its bill to foreclose a mechanic's lien against the property of the defendants, John Sherman, [illegible] Sherman et al., for a balance alleged to be due [illegible] contract for the sinking and underpinning of [illegible] of the residence located thereon. The [illegible] in chancery, who heard evidence and [illegible] the complainant was not entitled to a mechanic's lien [illegible] the bill be dismissed for want of [illegible]. The chancellor overruled the exceptions to the [illegible] and entered a decree [illegible] the bill of complaint be dismissed [illegible] of equity as complainant's costs. The complainant has appealed.

The material facts, briefly stated, are:

"1. The complainant, William H. Brown & Company, is a corporation duly organized [illegible] laws of the State of Illinois, with its principal place of business in the city of Chicago, County of Cook and State of Illinois, engaged in the occupation of house-movers, shoring and underpinning contractors.

"2. On August 6, 1927, the complainant entered into a written contract with the defendant John Sherman, with the knowledge and consent of the defendant [illegible] Sherman, his wife, for the shoring and underpinning of the [illegible] of their two-story brick residence, for [illegible] at 7[illegible] Cook [illegible] Drive, Chicago, Illinois, in more particularly described as

follows, to-wit: (Here follows the legal description of the property.) Said contract is in words and figures as follows:

"CONTRACT

"This agreement, entered into this fourth day of August, A. D. Nineteen hundred twenty seven, by and between, Wm. H. Brown & Co., a corporation of the State of Illinois, hereinafter called CONTRACTOR, and John Eberson, whose residence address is known as 7315 South Shore Drive, Chicago, Illinois, hereinafter called OWNER, WITNESSETH:

"The CONTRACTOR hereby agrees to furnish all labor, materials, tools and equipment required to do the necessary shoring and underpinning of the South wall of the two story brick residence located at 7315 South Shore Drive, Chicago, Illinois.

"It is further understood and agreed that the OWNER will pay the CONTRACTOR a profit of Fifteen per cent (15%) over and above the entire cost of the job, plus ten per cent (10%) for overhead, in current funds as follows:

"Eighty five per cent (85%) as the work progresses, and the balance to be paid not later than ten days after completion of the work.

"In testimony whereof both parties have caused their signatures to be affixed on the day and the year first above mentioned.

"Wm. H. Brown & Co.
by Wm. H. Brown _____ (SEAL)
CONTRACTOR Pres.

John Eberson

_____ (SEAL)
OWNER

"3. The complainant entered upon the performance of said contract on or about August 5, 1927, and in compliance with the terms thereof entered upon the above described premises and commenced to shore and underpin the South wall of the residence on said premises, and in the performance thereof furnished work, labor and materials.

"4. Complainant completed and furnished all the work, labor and materials that were done and furnished by it under said contract on or about August 25, 1927. A detailed statement of the work, labor and material, and the cost thereof, furnished by the complainant, is attached to the bill of complaint herein as Exhibit B.

"5. The work, labor and materials furnished by the complainant in the performance of the said contract are (if the work was properly done) of the fair and reasonable value of $1623.64. This, together with an overhead charge of 10% thereof in the sum of $162.36, and a further charge of 15% as complainant's

profit in the sum of $267.90, makes a total of $2053.90. The defendant John Eberson paid on account thereof, on or about August 27, 1927, the sum of $1000.00, leaving a balance unpaid the complainant in the sum of $1053.90.

* * *

"9. The defendant, John Eberson, has refused to pay said sum of $1053.90 to the complainant, and the same is totally unpaid.

"10. The dispute, in this case, is whether or not complainant's work was properly done.

"11. The Master finds that complainant's work was not properly done, and that complainant did not comply with its contract.

"12. The complainant did not furnish all the labor, materials, tools and equipment required to do the necessary shoring and under-pinning of the South wall of said residence. As a result thereof, the outside wall and the inside wall of the said residence cracked; the floors cracked and the residence settled; the floor of said residence became bent and warped; the doors were put out of alignment; the cracks in the walls admitted the weather inside of the house, so that rainwater blew in and ruined the decorations; the downspout was put out of alignment, and the floor of the rear porch buckled up.

"13. The cracks in the walls are shown by the photographs, Defendants' Exhibits 4, 5 and 6.

"14. In order to repair the damage inside the residence, Eberson ordered and had done, in September and October, 1927, and he paid for, carpenter work amounting to from $85.00 to $100.00, plastering about $125.00, and decorating $85.00 or $100.00

"15. He testified that in addition it would take about $900.00 to repair the walls structurally.

"16. Mr. Brown, the president of the complainant company, testified that the only damage to the building caused by the cracks in the walls is that the open mortar joints would have to be repointed, and this would cost about $35.00 or $40.00 on the front and probably $50.00 on the rear wall. He did not testify as to the cost of repointing or repairing the crack in the inner wall.

"17. The Master finds that the damage and injury to the residence caused by the failure of the complainant to perform properly the work required by the contract was and is substantial."

The complainant contends that it had substantially performed its contract and that the finding of the master in chancery that it had not substantially performed its contract is against the weight of the evidence. After a careful consideration of the evi-

profits in the sum of $[illegible], where a total of $[illegible] The defendant John Gordon paid on account thereof, on or about March 27, 1927, the sum of $[illegible]. In view of a balance unpaid the complainant in the sum of $[illegible].

"9. The defendant, John Gordon, has refused to pay said sum of $[illegible] to the complainant, and the same is totally unpaid.

"10. The claims, in this case, as whether or not complainant's work was properly done.

"11. The answer finds that complainant's work was not properly done, and that complainant did not comply with its contract.

"12. The complainant's contention is that labor all the labor, materials, tools and equipment furnished to do the necessary shoring and underpinning of the said walls of the building. As a result thereof, the exterior walls and the inside walls of the said building thereof, the floors crumble and the ceilings settled; the floor of the basement became wet and damaged; the doors were put out of alignment; the cracks in the walls obtained the weather inside of the house, so that a minister plan in the taking the cover-ceiling, the lamppost was put out of alignment, and the floor of the [illegible] upside up.

"13. The cracks in the walls are shown by the photographs, Defendants' Exhibits 4, 5 and 6.

"14. In order to repair the damage inside the residence, Thorson ordered the work done, in October and November, 1927, and he paid for, corporate work amounting to $[illegible] to $[illegible], plastering about $[illegible], and [illegible] or $[illegible].

"15. To testify that in addition to what [illegible] done, to repair the walls structurally.

"16. Mr. Brown, the president of the complainant company, testifies that the only change to the building caused by the cracks in the walls is that the open mortar joints would have to be repointed, and this would cost about $[illegible] or $[illegible] on the front and probably $[illegible] on the rear wall. He did not testify as to the work of repointing or repairing the cracks in the inner wall.

"17. The Master finds as to the damage and injury to the residence caused by the failure of the complainant to perform properly the work required by the contract and is substantial."

The complainant contends that it had substantially performed its contract and that the finding of the Master in chancery that it had not substantially performed the contract is against the weight of the evidence. After a careful consideration of the evi-

dence we have reached the conclusion that the instant contention is not a meritorious one. The complainant contends that it "performed its contract by a recognized, approved and correct method," and is therefore entitled to recover. It would be a sufficient answer to this contention to say that the defendants insisted that the complainant did not perform its contract in an approved and correct method, and the master was fully warranted in believing the testimony offered by the defendants in support of this contention. However, even if it were conceded that the complainant employed a recognized, approved and correct method in the performance of its contract, that fact would not entitle it to recover, because the master found that it did not do its work, in connection with the contract, properly and completely.

The complainant contends that "the defendant assumed to direct how the work was to be done" and that therefore "he assumed the responsibility therefor." It is a sufficient answer to this contention to say that the defendant John Ebersen denied that he directed how the work should be done and the master was justified in believing his testimony in this regard.

The complainant contends that after it had substantially performed its contract "and after the work was entirely completed, owing to the condition of the soil, the sand and the water, under the residence and owing to the weight of the thirteen-story building (adjacent), some settlement occurred," but that the complainant is not responsible for such settlement or the damage that it may have caused. The complainant states that the south wall settled "a long time after complainant finished its work." The instant contention is based upon the assumption that the womplainant did its work properly and that the settling of the wall took place a long time after it completed its work, and through no fault of the

[illegible]

complainant. The witness Yeates, who had charge of the work for the complainant, admitted that when he examined the basement after finishing the work he found a crack running at right angles with the south wall. Four days after the completion of the work the defendant John Oberson sent the following telegram to the complainant: "Outside wall of my residence underpinned by you has cracked and issettling causing serious damage to interior of my house. You are notified to give this matter your immediate attention as I am holding you fully responsible and am under the impression that your work was not done correctly." Four days later the attorneys for the defendants sent the complainant a letter in which they stated that the wall was cracking and serious damage was being done to the interior of the defendants' home. The defendant John Oberson testified that these cracks began to develop while the complainant was conducting its work and that he complained to Yeates and called his attention to the cracks and told him that the work was being done in an unsatisfactory manner and that he was fearful of results. This defendant also testified to cracks he observed on the southwest corner of the structure on the first floor and the east wall of the second floor. The defendants also offered evidence tending to prove that the method employed by the complainant in doing the work was not a proper one. We are satisfied that the master was fully justified in finding that the settling of the wall and the damage occasioned thereby was caused by the failure of the complainant to properly perform the work required by the contract. All of the complainant's witnesses agreed that the sole purpose of shoring or underpinning a building is to keep it from settling. The defendants argue that when the complainant contracted to furnish all labor and equipment required to do all the necessary shoring and underpinning of the defendants' residence it thereby impliedly warranted that what it did in the

[illegible]

performance of the contract would be sufficient to accomplish the purpose for which it was employed, i.e., to do whatever was necessary to prevent settling; that as no specifications were contained in the contract the manner of performance was entirely within the control of the plaintiff and as it was guaranteed a profit of fifteen per cent over and above the entire cost of the job it was assured of adequate and fair compensation, regardless of the expense involved, and that under the terms of the contract the plaintiff was required to so shore and underpin the defendants' residence that it would not settle. While there is undoubtedly much force in this contention, we do not deem it necessary to pass upon the same.

The decree of the Circuit court of Cook county is affirmed.

AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

performance of the [illegible]

purpose [illegible]

in previous [illegible]

the course [illegible]

total of [illegible]

per cent [illegible] the [illegible]

of adequate [illegible]

and in [illegible]

to so [illegible]

not [illegible]

we do not [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

35372

CATHERINE WALSH,
Appellee,

v.

UNION BANK OF CHICAGO,
a Corporation, as Trustee,
etc., et al.,
Defendants.

PERSONAL HOME MORTGAGE
COMPANY, a Corporation,
Appellant.

INTERLOCUTORY

APPEAL FROM INTERLOCUTORY

ORDER OF THE CIRCUIT COURT

OF COOK COUNTY APPOINTING

A RECEIVER.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order appointing a receiver upon a bill to foreclose a first mortgage trust deed upon certain real estate.

At the time of the application for a receiver the appellant, Personal Home Mortgage Company, a corporation, was in possession of the premises under an assignment of rents to secure a balance, due on principal and interest, of $3,600 on its second mortgage, on which the mortgagors were in default since January, 1931. Notice of the motion for the appointment of a receiver was given to the appellant, the owners of the equity of redemption, the beneficial owners of the title and the makers of the notes. A hearing of the motion was had before the chancellor on June 24, 1931. At the hearing the complainant read to the chancellor the verified bill of complaint and the petition of the complainant, to which was attached an affidavit, and the appellant read its verified answer to the petition of the complainant. The complainant was the owner of a senior mortgage given to secure notes aggregating $16,000.

CATHERINE WELCH,
appellee,

v.

UNION BANK OF CHICAGO,
a Corporation, as Trustee,
etc., et al.,
Defendants.

PERSONAL HOME LOAN
COMPANY, a Corporation,
appellant.

MR. JUSTICE [illegible] delivered the opinion of the Court.

This is an appeal from an interlocutory order appointing a receiver upon a bill to foreclose a first mortgage lien and upon certain real estate.

At the time of the application for a receiver the appellant, Personal Home Loan Company, a corporation, was in possession of the premises under an [illegible] to secure a balance, due on principal and interest, on [illegible] the second mortgage, on which the mortgagors were in default since January, 1931. Notice of the motion for the appointment of a receiver was given to the appellant, the owners of the equity of redemption, the beneficial owners of the title and the makers of the notes. A hearing of the motion was had before the Chancellor on June 24, 1931. At the hearing the complainant read to the Chancellor the verified bill of complaint and the petition of the complainant, to which was attached an affidavit, and the appellant read the verified answer to the petition of the complainant. The complainant was the owner of a senior mortgage lien to secure notes aggregating $18,000.

The bill alleges that the entire indebtedness was declared due because of a default in the payment of the semi-annual interest due on the principal note April 18, 1931, and for the further reason that the mortgagors have failed to pay the general taxes upon the premises for the years 1928 and 1929, amounting, for the two years, to $1,000. The bill further alleges that there is a second mortgage upon the premises in the sum of $6,000, which is held by the appellant, and that the latter, under a purported assignment of the rents thereof, is collecting the rents therefrom and applying them towards the payment of liens upon the premises, which "are subject, subordinate and inferior to the lien" of the complainant's trust deed. The bill further alleges that there is a third mortgage of $8,000 upon the premises and that there are two unsatisfied mechanics' liens of record against the premises. The verified petition of the complainant for the appointment of a receiver states (inter alia) "that the bill of complaint filed herein seeks to foreclose the first trust deed on the premises known as No. 6341 North Claremont Avenue, Chicago; that said premises consists of three apartments of five rooms each; that said premises have been appraised by a disinterested and unbiased appraiser and that the value placed thereon by the said appraiser as evidenced by the original appraisement which is attached hereto and made a part hereof, is $22,234.00." Attached to the affidavit was an itemized real estate appraisal of the premises in question made by a real estate appraiser. The verified answer of the appellant to the application stated that the fair and reasonable market value of the premises was $27,000, and that the "defendant (appellant) is the owner and holder of a junior mortgage on said real estate securing a note on which there is a balance due of $3600.00 and on which there has been default made in the payment of

[illegible]

principal and interest since January, 1931, and that this defendant is in possession of said premises under an Assignment of Rents."

The appellant contends that the chancellor abused his discretion in appointing the receiver. We have carefully considered this contention and we are satisfied that it is without merit. The appellant also contends that the court failed to give it an opportunity to be heard in opposition to the motion for the appointment of the receiver. We find no merit in this contention.

The interlocutory order of the Circuit court of Cook county is affirmed.

INTERLOCUTORY ORDER AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

pleaded and trained since January, 1971, and that the defendant is in possession of this premise under an [illegible] lease.

The application contains that the owner has refused his direction in painting the premises. [illegible] certainly considered this construction and [illegible] a right. [illegible] is without merit. The appellant also [illegible] in [illegible] Fallon [illegible] is an opportunity to be heard in opposition to the motion for the appointment of the receiver. [illegible] no merit in this contention.

The interlocutory order [illegible] court of Cook county is affirmed.

[illegible]

Orders affirmed. [illegible] and [illegible], JJ., concur.

34485

FOREMAN TRUST & SAVINGS BANK, a Corporation, ADMINISTRATOR OF THE ESTATE OF FRANK CHANDLER, DECEASED,	)	ERROR TO
Plaintiff in Error,	)	CIRCUIT COURT
v.	)	
CHICAGO SURFACE LINES, et al.,	)	OF COOK COUNTY.
Defendants in Error.	)	26314 2525

Opinion filed 12/2/31

MR. PRESIDING JUSTICE HABEL delivered the opinion of the court.

This is an action by the Administrator of the estate of Frank Chandler, deceased, against the Chicago Surface Lines, for damages arising from the death of plaintiff's intestate, caused by the negligence of the defendant. At the close of the plaintiff's evidence, the Court instructed the jury, upon defendant's motion, to find the defendant not guilty.

The facts are that the accident occurred at the intersection of State and 50th Streets, in the City of Chicago, in a business section, at about 6 o'clock on the morning of November 9, 1926. State Street is paved, and there are two street car tracks thereon running north and south. Frank Chandler was married, left a widow and three adult children, worked at a coke plant in South Chicago, and was in good health. On the morning of the accident he was walking west on the north side of 50th street, presumably bound for the west side of State Street, to take a southbound State Street car to go to work. When he reached the east side of State Street, a northbound street car was approaching on the east track. The car was electrically lighted and the headlight was burning. Several persons were standing near the south side of the intersection of State and 50th streets, but the northbound car in question did not stop for those persons at 50th street. When the car arrived at

Opinion filed 12\5\31

50th street it was running at a rate of speed estimated at from 10 to 15 miles per hour. One witness testified that, "it slowed up a little bit for the intersection," but other witnesses testified that, "it ran across the street without slackening speed." The street lights were out this early in the morning, and there were no lights shining from any of the buildings. It was raining and misty at the time of the accident. One of plaintiff's witnesses was on the front platform of the northbound street car. He first saw Chandler when Chandler was hurrying west on the north side of 50th street, at about 4 feet east of the northbound track, and when the street car was 15 feet away from him. Another witness for the plaintiff, standing west of the southbound track and 40 or 50 feet north of 50th street, first saw Chandler when he was two feet in front of the street car. The third witness for plaintiff last saw Chandler when he stepped down from the curb on the east side of the street. Plaintiff's fourth witness saw Chandler leave the east curb and saw him struck by the front of the street car. The street car at the time was making a noise, caused both by the wheels on the rails and by the trolley on the wire. When Chandler closely approached and stepped upon the northbound track his gait is described as hurrying or rushing, not running. When Chandler's approach to the track was discovered by the motorman of the northbound street car, he applied the brakes so severely that it dislodged the position of one of the passengers on the front platform. At the trial the passenger testified for the plaintiff. Chandler was struck by the center of the northbound car and thrown about 10 feet forward and a little to the left, so that he landed in the space between the two tracks. After the brakes had been applied the speed of the street car slackened, and it was stopped in about a car length. After the accident the southbound car came up and stopped near the north side of 50th Street. These were substantially the facts before the court when the jury was instructed to find the defendant not guilty.

Passing upon the questions in the record, this court will consider the evidence in the most favorable light, with all reasonable inference to be drawn therefrom, to establish the plaintiff's case.

The allegations in the several counts of the declaration are general negligence, wanton and wilful conduct by the agents of the defendant, operation of the street car at a high and dangerous rate of speed, failure to ring a bell or sound a gong, or to give other warning, and a failure to keep a proper lookout, and the allegation that the plaintiff was in the exercise of due care for his own safety at the time and immediately prior to the accident. The question, therefore, presents itself, is there any evidence tending to sustain the averments of the declaration?

The plaintiff contends that the street car instead of stopping when it reached 50th street for passengers, continued to cross 50th street on State street without the motorman ringing a bell or giving any other warning to pedestrians who were using the north cross-walk on 50th street at the intersection of South State street. If Chandler, the deceased, had a right to believe, and did believe that at the time of the accident the car would stop and pick up the waiting passengers, then he must have looked and seen that the car did not stop and was proceeding north at a rate of speed from 10 to 15 miles per hour when he stepped onto the east track. At the time he did this, the street car was 15 feet from him, and he took the chance of passing ahead of the car when it was so close as to be almost upon him. It has been held by the Appellate Court in the case of Deming, Admr. v. C. Rys. Co., 334 Ill. App. 642, that where persons had been acting upon the assumption that a car would stop, because signalled or slowing down, under varying circumstances it was negligent to act upon such an assumption.

The car was lighted and the headlight was burning. The wheels on the car as it ran on the street car track, and the wheels at the end of the trolley pole as it ran on the trolley wire, made a noise in the early morning hours that was heard by witnesses who testified for the plaintiff. There is no evidence that a gong was not sounded, bell rung, or other warning given as the car proceeded north over this intersection, and the record is silent as to whether or not 50th street at the point in question is a stop street. The view of the approaching car was unobstructed and the car was seen by the witnesses appearing for the plaintiff. From the evidence it does not appear that the deceased was facing in any other direction than west when he was hurrying on the north cross-walk at 50th street as he approached the street car tracks. The rule is that failure to look before crossing a street car track is not always negligence per se, but it is likewise true that the circumstances may be such as to make such an act negligence, as a matter of law. Van Meter, Admr. v. C. Rys. Co., et al. 240 Ill. App. 371; Nelson v. C. C. Ry. Co. 194 Ill. App. 615; Ehrenstrom v. C. C. Ry. Co. 205 Ill. App. 583; Roberts v. C. C. Ry. Co., 262 Ill. 238; Myhre v. C. C. Ry. Co. 216 Ill. App. 128.

On the other hand, if Chandler when he approached the cross tracks at the cross-walk on the north side of 50th street, did not look for approaching cars when he was 4 feet from the rails and the car was 15 feet distant, he was guilty of contributory negligence, as a matter of law. This is a reasonable inference from the plaintiff's evidence. The plaintiff relies largely on the case of Loftus v. Chicago Rys. Co. 293 Ill. 475, as an authority that under the particular circumstances in this case, reasonable care was a question of fact for the jury.

The evidence of the plaintiff failed to show any circumstance tending to excuse a failure to look, or which may have

given rise to a necessity to cross in front of the street car without looking. Van Meter v. C. Rys. Co., supra, and it does not appear that, at the time he crossed the tracks where the accident happened, the speed of the car was increased as it crossed the intersection.

The circumstances in the Loftus case are not like those in the instant case. Under the facts established in the former, the deceased, a pedestrian, carefully looked when he was within 3 or 4 feet of the track, and saw the street car within 75 feet west of him, apparently coming to a stop, and after he started to cross the track the street car speeded up and crossed the street crossing at an unlawful and unusual rate of speed. Under the facts and circumstances in that case, contributory negligence was a question of fact for the jury. The trial court in the instant case did not err when it found as a matter of law that the plaintiff did not prove actionable negligence, and that the plaintiff was not in the exercise of due care for his own safety at and immediately prior to the accident. Therefore, the instruction to find the defendant not guilty was proper.

The facts do not justify any other conclusion than that the deceased in his lifetime disregarded every precaution that should have been exercised by him in order to avoid injury. "No one can assume that there will not be a violation of the law, or negligence of others, and then offer such assumption as an excuse for failure to exercise care." Citing Greenwald v. B. & O. R. R. Co., 332 Ill. 627, Goodman v. C. & E. I. R. R. Co., 248 Ill. App. 128.

For the reasons set forth in this opinion, the judgment is affirmed.

JUDGMENT AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

34775

MARY LAUGHLIN,	)	ERROR TO
Defendant in Error,	)	
	)	SUPERIOR COURT,
v.	)	
	)	
CHECKER TAXI COMPANY,	)	COOK COUNTY.
	)	
Plaintiff in Error.	)	

167

263 I.A. 653

Opinion filed Dec. 2, 1931

MR. PRESIDING JUSTICE WEBB delivered the opinion of the court.

This suit is an action of trespass on the case to recover damages for personal injuries alleged to have been sustained by the plaintiff while riding as a passenger in a taxicab owned and operated by the United Taxicab Association, Inc., which injuries were caused by a collision with a taxicab of the Checker Taxi Company. The case was tried, and a verdict was returned by the jury, finding both defendants guilty and assessing the damages at [illegible]. Upon a motion for a new trial, the court vacated and set aside the verdict and dismissed the cause as to the United Taxicab Association, Inc. Judgment was entered against the Checker Taxi Company for the amount of the verdict, from which judgment the Checker Taxi Company appeals.

The defendant contends that the burden is upon the plaintiff to establish by a preponderance of the evidence that the injury of which she complains was the proximate result of the negligence of the defendant.

In passing upon the point made by the defendant, the court will consider the evidence as it appears in the record. The plaintiff testified in her own behalf as to the occurrence as follows: That she and her husband rode in a taxicab of the United Taxicab Association, Inc., on February 20, 1929, in the evening,

Opinion filed Dec. 18, 1951

from her daughter's home at 5137 Division Street, and that they were on their way home when the accident in question happened; that she sat on the right side of the cab as it proceeded east on Grand Avenue, and when the cab came near Homan Avenue she saw the Checker Cab "hit us" as she expressed it, and that the cab struck the left side of the car in which she was a passenger; that she remembered nothing more; that she could not tell from which way the Checker Taxi came, or its speed at the time of the accident; that the United Taxi cab did not skid; that after the collision she was taken immediately to a hospital. The only other evidence offered by the plaintiff was as to her injuries and condition following the accident.

The defendant called Joe Becker, the chauffeur for the Checker Taxi Company, as a witness. His evidence is, substantially, to the effect that he worked for the defendant, and that on or about midnight sometime in February, 1929, a collision took place at Homan Avenue and Grand Avenue; that at the time, he was driving on the north side of Grand Avenue in a northwesterly direction and stopped at Homan Avenue, a through street; that at that point there is an incline; that he drove under the viaduct and up the incline, making a right turn; that the car was in second speed; that a car was going in the opposite direction, and when the cars were about opposite each other the United Taxicab skidded on the snow into the Checker cab, which was on the north side of the street car rails; that after the impact both cars stopped; that the only damage done was to the front bumper and the rear fender of the cars. The witness further testified that the Checker cab was travelling to the right of the northbound street car rails, and that chains were on the wheels at the time of the accident.

The driver for the United Taxicab Company, in whose car the plaintiff was a passenger, did not appear as a witness, and

so in the record we have only the evidence of the plaintiff and the witness Becker as to what occurred at the time of the collision.

Becker's version of the accident is given, and he is the only witness who described the occurrence. The plaintiff's testimony, on the other hand, does not describe what happened; it only shows that she saw the collision between the cars, and that was all she remembered. The burden is upon the plaintiff to establish by facts the negligence alleged in the declaration. Upon the happening of an accident, negligence will not be presumed, but negligence must be established by the plaintiff from a preponderance of the evidence in order to charge the defendant with such negligence. This burden of proof was upon the plaintiff, and the evidence offered in her behalf did not meet this requirement. While this court will not reverse a judgment on the ground that the plaintiff did not prove her case by a preponderance of the evidence, where the jury considered the credibility of the witnesses and passed upon the weight of the evidence, still it is the duty of the court to reverse a judgment where it is evident, as in the instant case, that the judgment is against the manifest weight of the evidence.

It may be noted that the plaintiff's appearance was not filed in this court, and therefore we do not have the benefit of a brief in her behalf upon the questions before us.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

FRIEND AND WILSON, JJ. CONCUR.

is given.

34820

MARTIN ECKLES, et al.,
Appellees,
v.
WESTERN & SOUTHERN LIFE INSURANCE COMPANY, a Corporation,
Appellant.

) APPEAL FROM
) MUNICIPAL COURT
) OF CHICAGO.

263 I.A. 653

Opinion filed Dec. 2, 1931

MR. PRESIDING JUSTICE HEBEL delivered the opinion of the court.

This is an action brought by the plaintiff, Martin Eckles, to recover $500 under the terms of an insurance policy issued on November 1, 1926 by the defendant, in which it agreed to pay this sum upon the death of Jennie Eckles. A statement of claim was filed by the plaintiff, to which the defendant filed an affidavit of merits. Thereafter, John W. Shotwell, as administrator of the estate of Jennie Eckles, was made an additional party plaintiff, and the cause was dismissed as to the other plaintiff, Martin Eckles. An amended statement of claim was filed, to which the defendant filed an amended affidavit of merits. Trial was had before the court, and there was a finding and judgment in favor of the plaintiff in the sum of $500. From this judgment the defendant has appealed to this court.

The principal contention made by the defendant before this court is that the condition in the insurance policy issued by the defendant, namely, that:

> "No obligation is assumed by the company unless on the date and delivery hereof, the insured is alive and in sound health."

is a condition precedent to liability thereon, and that it was incumbent upon the plaintiff to prove affirmatively by a preponderance of the evidence that the insured, Jennie Eckles, was in sound health

Opinion filed Feb. 3, 1931

of the court.

on the policy date, and on the date of its delivery. This is not disputed by the plaintiff, who urges that this contention made by the defendant is but a question of fact to be decided by the Court from the evidence.

The policy of insurance, proof of claim, and evidence of the refusal of the defendant to pay, except to return the premiums, are in the record.

The plaintiff testified, in substance, that he is the father of Jennie Eckles, now deceased; that she died on March 22, 1927, at the Municipal Tuberculosis Hospital; that she was married to Andrew Eckles, and was the mother of three children; that at the time of the issuance of the policy she had been living with him for six or seven months, and that he saw her both morning and night, and that at the time she appeared to be in good health, doing work around the house and taking care of the home; that he did not see her cough, and that she never complained of pains in the chest or had a hemorrhage; that one of the witnesses Dr. John Edward Zarembe, appearing for the defendant, testified that he was the family physician of Jennie Eckles, and that he examined her on October 16, 1926, and again on October 18, 1926; that aside from a skin trouble, Jennie Eckles was a person in good health.

Further evidence of the defendant is based upon the admissions and statements contained in a hospital record dated January 4, 1927, and more particularly upon the statement therein of Jennie Eckles that she was perfectly well until about two months previous to that time.

The question of good health in the instant case is one of fact, and the court in considering the evidence was guided by the law. One of the rules applicable to the case before the trial court is that where the proof consists largely of the admissions

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~~that appear in the hospital records~~, such evidence is less satisfactory than that of the witness who testified to personal knowledge of the facts in controversy, as did the witness Dr. John Edward Zaremba, who testified to Jennie Eckles' physical condition at the time of examination. ~~Jones, et al.~~ Cahill v. Fitzgerald, ~~Marks~~, 40 Ill. ~~313~~ 310. It is not the duty of this court to distrub the finding and judgment of the trial court, although upon the evidence in the record we maybe in doubt how we ourselves would have found. ~~Jones, et al.~~ Cahill v. Fitzgerald, ~~Marks~~, supra.

The burden of proof is upon the plaintiff to show that at the time of the delivery of the policy Jennie Eckles was in good health. This the plaintiff proceeded to do when testifying upon that question.

The defendant contends that the evidence of the plaintiff was erroneously admitted because the plaintiff did not file a reply to the defendant's affidavit of merits, in which it was alleged that the insured was not in sound health on the date the policy was issued, but was suffering from pulmonary tuberculosis, and that the defense being an affirmative one, the evidence of the defendant must stand as true. In support of this contention the defendant cites the case of Cohen v. New York Life Ins. Co., 256 Ill. App. 345. This case is not in point for it appears from the opinion of the court that it is incumbent upon the plaintiff, under Rule 15 of the Municipal Court of Chicago, to file a reply to the defendant's affidavit of merits setting up a defense of fraud and misrepresentation by the insured in the insured's answers to health questions in his application if he desires to put such facts in evidence.

In the instant case the good health clause is in the policy itself, and, as we have indicated, this is a condition precedent to the right of recovery, and the burden is upon the plaintiff to establish such right. The evidence by the plaintiff upon

this question was properly admitted.

From the conclusions we have reached upon the questions involved in this case, the judgment is affirmed.

JUDGMENT AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

34826

EDGAR WENGER,

Appellee,

v.

MOTORISTS ASSOCIATION OF ILLINOIS, a Corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

265 I.A. 653

Opinion filed Dec. 3, 1931

MR. PRESIDING JUSTICE HEBEL delivered the opinion of the court.

This is an appeal by the defendant from a judgment for $3500. entered by the Court upon a verdict of the jury in an action of assumpsit.

The declaration consists of three counts, and the action is based upon a covenant in a lease for the recovery of a deposit of $2500. made by the plaintiff and received by the defendant.

To this action the defendant filed a plea of the general issue, together with a notice of set-off, claiming damages arising from a breach of the covenants in a lease entered into by the plaintiff and the defendant. The covenant, the subject of this litigation, is as follows:

> "4. The lessee (plaintiff) has deposited with the lessor (defendant) the sum of $2,500. If the lessee shall notify the lessor on or before September 1st, A. D. 1928, that said lessee elects to terminate this lease on September 1st, 1928, then this lease shall be and become null and void on said date and the lessor shall on September 1st, 1928, pay back to the lessee the sum of $2,500 so deposited by him as aforesaid."

The defendant contends that failure to incorporate the lease in the declaration, either in whole or in substance, is a material defect and is not cured or aided by the verdict.

The first count of the declaration avers, in part, that the plaintiff entered into a written lease, under which, at his option, a deposit by him of $3,500 was to be returned upon notice given to the defendant that plaintiff elected to terminate the lease; and plaintiff further avers performance upon his part, the giving of notice, and failure of the defendant to return the $3,500.

The second count avers, in substance, that if the plaintiff would lease the premises in the Motorists Association Building, and deposit $3,500, the defendant would pay back the $3500 should the plaintiff notify the defendant on or before September 1, 1928, that he elected to terminate said lease; that the plaintiff did lease the premises and pay to the defendant $3,500; that prior to September 1, 1928, the plaintiff notified the defendant of his election to terminate the lease, and requested the return of the $3,500; and that the defendant failed to return the deposit.

The consolidated common counts are also a part of the declaration.

At the trial the lease in question was admitted in evidence without objection. The rule which applies, as to the sufficiency of the declaration, is that if no cause of action is alleged in the declaration, failure to object to the admissibility of evidence does not waive the right to raise the question; but where a good cause of action is defectively stated, the action is aided by the verdict. In the instant case the substance of the covenant as set forth in the declaration, and according to its legal effect, is sufficiently stated and is aided by the verdict of the jury. The defendant moved, and the court ordered that the plaintiff file a copy of the instrument sued on, which was done. However, the declaration does not make reference to the lease so filed, and the rule is

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that papers attached to the declaration form no part of it and cannot be made so by reference.

The defendant further urges that the plaintiff must aver in his pleading and prove that the plaintiff performed the conditions precedent in order to make a prima facie case. The position of the plaintiff on this question is that the provision regarding the cancellation of the lease and the return of the deposit is an independent covenant, and not a condition precedent to performance.

The condition, as it appears in the lease and as set out in full in the opinion, is construed by this court to the effect that the covenant is complete and contains no reference to, or is limited by, any other covenant in the lease. This conclusion is amply supported by the rule that courts will construe covenants, like other agreements, in accordance with the intention of the parties, and where it is doubtful whether the covenant or agreement was intended by the parties to be a condition precedent or an independent covenant, the courts will construe it as an independent covenant, especially where the defendant has derived some benefit from the contract. Freet v. American Electrical Supply Co., 152 Ill. App. 205.

The question of damages is raised by the notice of set-off in this case arising from a breach of the covenants in the lease, and is a proper element for a jury to consider, where an action is based upon an independent covenant, such as we have in the instant case. The court in the case of Palmer v. Meriden Britannia Co. 184 Ill. 508, passed upon this question and said:

> "Where the plaintiff's covenant goes to only a part of the consideration, and a breach of the covenants can be compensated in damages, the defendant cannot rely upon the covenant as a condition precedent, but must perform the covenant on his part, and then rely upon his claim for damages for any breach of the covenant by the other party, either by way of recoupment, or in a separate action."

[illegible]

cannot [illegible] as [illegible].

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expedition [illegible]

contract. [illegible]

[illegible]

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issue, [illegible]

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[illegible]

Therefore, under the rule, in order to recover on its set-off, it was incumbent upon the part of the defendant to prove a breach by the plaintiff, and that defendant sustained damages.

The facts were before the jury and were passed upon against the contention of the defendant when the court entered judgment on the verdict.

We have examined the ruling of the Court on the admissibility of evidence and are unable to find that the defendant was prejudiced by the ruling of the trial court, or that there was error such as would warrant a reversal. From the record the verdict of the jury was fully supported by the evidence, and the judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

34895

HELEN JANOS,
Appellee,
v.
ALBERT A. HENRY,
Appellant.

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY.

263 I.A. 653

Opinion filed Dec. 2, 1931

MR. PRESIDING JUSTICE HEBEL delivered the opinion of the court.

The plaintiff sued the defendant in an action of trespass, and in the declaration filed by the plaintiff it is alleged, in general, that on December 3, 1928, the defendant, with force and arms entered her dwelling place, and seized and took possession of her household goods.

It is also averred that the defendant assaulted and struck the plaintiff, that she was injured and damaged as a result of these acts. The defendant filed a plea of not guilty. The case was tried, and at the close of the evidence the jury returned a verdict finding the defendant guilty and assessing the damages in the sum of $270.00. The court, after overruling a motion for a new trial, entered judgment, and the defendant appeals.

Plaintiff's evidence is, in part, that the defendant, together with a deputy sheriff and his custodian, entered the premises occupied by the plaintiff and her husband, Peter Janos. The manner of gaining entrance was by knocking on the door. When the plaintiff opened the door part way, the defendant violently forced it open so that the plaintiff was knocked down and suffered from the shock, and was ill for ten or twelve days. The defendant after

gaining entrance, took an inventory of the furniture, in which he was assisted by his agents. In doing this, the furniture was piled in one corner of the room, and the silverware and wearing apparel were thrown on the floor. During this time, the defendant pulled the plaintiff by the arm into a bed-room and refused to release her.

The evidence of the defendant is that, he and two other men entered the apartment occupied by Peter Janos and his wife, after the door was opened; that the defendant was there to execute a distress warrant by levying upon the furniture of Peter Janos. This distress warrant was signed by the defendant, and was for rent due for the apartment occupied by the plaintiff and her husband, Peter Janos, in a building located at 4356 Irving Avenue, Chicago, Illinois, and owned by the defendant.

After leaving a copy of the distress warrant on the premises and taking an inventory of the furniture, the defendant and the two men with him, left the premises. The defendant denied that any violence was used or that any furniture was broken or damaged. The plaintiff did not file an appearance and brief, and the court does not have the benefit of her views upon this record.

There are two reasons why the judgment must be reversed: (1) That the Court in the presence of the jury made prejudicial remarks; and (2) that the attorney's argument to the jury on behalf of the plaintiff was improper and prejudicial.

As to the first point: The Court, in the presence of the jury remarked, in effect, that a landlord had no right to enter an apartment and levy a distress warrant upon the furniture of a tenant; and that, further, "No one could obtain and serve a distress warrant unless it was issued and ordered by a court". These remarks were erroneous, for under our procedure, the only proper way for the court to instruct a jury is in writing, and in doing so, instruct the jury in regard to the law governing the issuance and levy of a

gaining entrance, [illegible] satisfied by his [illegible] door, [illegible] corner of the room, [illegible] on the floor. [illegible] by the sum into a [illegible] to [illegible]

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[illegible] premises [illegible] the two men with him, left the [illegible] any violence [illegible] The [illegible] not have the benefit [illegible]

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(1) That the court [illegible] remarks; and (2) [illegible] of the [illegible]

[illegible] of the jury [illegible] an assistant and [illegible] tenant; [illegible] "no one [illegible] [illegible] it was [illegible] [illegible] were arrested, for [illegible] court to instruct [illegible] the jury in [illegible]

distress warrant. No doubt the jury was influenced by these remarks, which were harmful and prejudicial to the defense offered by the defendant that he was in the apartment for the purpose of levying a distress warrant.

The second point is based upon error by the plaintiff's attorney in making improper remarks in his argument to the jury such as:

> "Mr. Tenny: He tried to bluff and scare this poor defenseless woman, when he knew she was alone in the flat. He knew her husband was working.
> Mr. Hamilton: I object. There is no evidence whatever that he knew she was alone. He said he didn't know.
> The Court: The jury heard it.
> * * * * *
> Mr. Tenny: And this poor millionaire was afraid that this woman would -
> Mr. Hamilton: I object to that poor millionaire.
> The Court: He didn't strike me as a millionaire. I don't know how he struck the jury.
> * * * * *
> Mr. Tenny: He is the landlord. Our law doesn't treat anyone like that.
> Mr. Hamilton: I object. That is not stating the law. I object to his discussing the law with the jury.
> The Court: The Court will give them all the law in this case.
> Mr. Tenny: And then what happened? This woman was so frightened; she testified she was in a pregnant and delicate condition.
> Mr. Hamilton: I object to that, Your Honor. The jury were instructed to -
> The Court: Wait a minute. She said she was pregnant one month, and that was stricken out. The jury will disregard it."

Helpful argument will aid the jury. Remarks such as we have before us will not help, but rather tend to prejudice the jury. Such remarks as, "this poor millionaire," and "He tried to bluff and scare this poor defenseless woman," only have a tendency to arouse the passions of the jury, and the trial court should not tolerate such argument.

For the reasons given, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

FRIEND AND WILSON, JJ. CONCUR.

34907

McCORMICK BUILDING CORPORATION,
a Corporation,

Appellee,

v.

DAVID E. KENNEDY, INC., a
Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

263 I.A. 654

Opinion filed Dec. 2, 1931

MR. PRESIDING JUSTICE HEBEL delivered the opinion of the Court.

This is a first class action instituted by the plaintiff in the Municipal Court of Chicago to recover damages from the defendant for an alleged breach of a contract for the construction and laying of a rubber tile floor. The case was submitted to the court and judgment was entered upon the finding for the plaintiff in the sum of $1,000.

The contract was entered into on August 11, 1927, between the plaintiff and the defendant, and provides for the installation of a floor covering of rubber-marble tile in the George Annes Restaurant in the McCormick Hotel, located at Rush and Ontario Streets, Chicago, Illinois.

As part of the contract there is incorporated a written guarantee as follows:

> "4. We hereby guarantee that all materials and workmanship furnished by us shall be first class and agree to make good any defects due to inferior materials or workmanship which develop and are brought to our attention in writing within one year from date of completion, if we have received payments as agreed and provided; but we shall not be responsible for any defects due to defective backing or underfloors or to dampness in same or to improper work and materials of other parties, nor for any unevenness or unlevelness in the finished floor which is due to unevenness or unlevelness of underfloors not furnished by us. We disclaim any liability other than above stated, particularly liability

Opinion filed Dec. 2, 1931.

of the Court.

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plaintiff in the [illegible]

the defendant for [illegible]

tion [illegible]

the court [illegible]

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written [illegible] follows:

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for any damage due to failure of customer to claim and observe our instructions for care and cleaning. This warranty is in lieu of all other warranties, expressed or implied."

It appears from the evidence in the record that the tile was made by the Wright Rubber Products Company and that the quality of the material, and the workmanship was to be first class; that the work was completed, and that F. J. Meles, architect for the plaintiff, passed upon the work and issued a final certificate of completion, and that the contract price was paid; that after a few months this tile floor behind the counters and in the lanes travelled by the waiters of the restaurant, began to bulge up and become loose; that an examination of the loose tile showed that it had become enlarged and was saturated with grease, which caused the tile to expand and bulge up and come loose from the floor; that the defendant replaced some of the tile; that about a year later, the plaintiff relaid part of the floor with a rubber tile three-eights of an inch in thickness, which is twice as thick as the tile called for and laid under the contract with the defendant; and that the cost of the second floor as relaid, was the sum of $2,240.

The principal contention of the defendant is that the court, over the specific objection of the defendant, admitted evidence to the effect that the defendant orally guaranteed the tile to be fit for the purpose desired, and that the tile would not absorb grease, which is in violation of the rule that parol evidence is not permissible to change or to vary the terms of a written instrument entered into and signed by the parties; and that all prior conversations are merged in the written agreement. The law expressed by the Supreme Court of Illinois in its opinion in the case of Armstrong Paint Works v. Continental Can Co., 301 Ill. 102, clearly states the rule, and is binding upon this court. The Court says:

"In construing a contract it is proper for a court to take into consideration the surrounding circumstances. It should place itself as nearly as it can in the same situation as the parties who made the contract, so that it may view the circumstances as they viewed them and so it may judge the meaning of the words and their application to the things described as the parties judged and applied them. (2 Jones' Com. on Evidence, Sec. 453.) But this does not give either party the right to establish a different contract from that expressed in the written agreement. When parties sign a memorandum expressing all the terms essential to a complete agreement they are to be protected against the doubtful veracity of the interested witnesses and the uncertain memory of disinterested witnesses concerning the terms of their agreement, and the only way in which they can be so protected is by holding each of them conclusively bound by the terms of the agreement expressed in the writing. All conversations and parol agreements between the parties prior to the written agreement are so merged therein that they cannot be given in evidence for the purpose of changing the contract or showing an intention or understanding different from that expressed in the written agreement."

The question naturally arises, did the trial court err in permitting evidence to be received which violates this rule of law? The plaintiff was represented by Edmund J. Weles, an architect, who signed the contract, and, after the tile floor was installed, stated that, "It appeared fine, good looking and level;" recommended payment, and issued an Architect's Certificate therefor. He testified, in effect, that he had a conversation with Elwell, Manager of the Chicago Office of the defendant, before the signing of the contract, and that Elwell stated to him that the floor would "stand the uses the restaurant put it to," and that the tile would stand grease.

The testimony of the witness Benjamin E. Cohen is that he had a conversation with Elwell, defendant's Chicago office manager, before the contract was signed, and was told by him that the tile was first class, would not buckle, was grease, dishwater and moisture proof, and would last the lifetime of the building.

All of this evidence was admitted over the objection of the defendant and is an attempt to enlarge the guarantee to the effect that the rubber tile would stand grease, and that grease would not be injurious to the tile. This is conclusive from the

testimony of Cohen, when he testified that Elwell told him the tile would last during the lifetime of the building. The contract for this work is in writing and is complete, and all prior agreements and understandings relative thereto, are merged in this contract. If the plaintiff omitted to have this parol agreement incorporated in the contract it may be unfortunate, but the fact that these conversations took place, will not open the door for the admission of this parol evidence so as to establish a different contract. This conclusion is fully borneout and supported by the opinion of the Supreme Court in the case of Armstrong Paint Works v. Continental Can Co., supra.

This contract in express terms guarantees that all materials and workmanship furnished by the defendant shall be first class and that the defendant shall make good any defects due to inferior materials or workmanship, and this guarantee cannot be further enlarged by the parol evidence in the record. The law is against the contention of the plaintiff that the phrase or expression "first class" is relative in meaning and that parol evidence is admissible to explain it. The evidence of the plaintiff was offered not to explain the words in the contract, but rather to enlarge the guarantee by adding an implied one, which clearly changes the meaning and in effect changes the contract. This is in violation of the rule that where a contract, such as the one in the instant case, contains an express guarantee, no others will be implied. If a contract is complete in its terms, the parties can be protected only by applying the rule that each is bound by the express terms of the written agreement.

The conclusion necessarily follows that the court erred in the admission of this evidence offered by the plaintiff. The case must, therefore, be reversed and remanded for a new trial. As to the other points raised in the record, the Court does not deem it necessary to pass upon them.

REVERSED AND REMANDED.

FRIEND AND WILSON, JJ. CONCUR.

34988

LLOYD F. NEELY, doing business as Neely Printing Company, Plaintiff, (Appellee) vs. THE MIDLAND CLUB, a Corporation, Defendant. (Appellant)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

263 I.A. 654

Opinion filed Dec. 2, 1931

MR. PRESIDING JUSTICE HEBEL delivered the opinion of the Court.

Plaintiff's action is a first-class contract case, brought in the Municipal Court of Chicago for the recovery of work, labor and materials furnished to the defendant at its request, in printing, composition and makeup of the Midland Target, defendant's publication. The case was tried before the court, without a jury, which found the issues for the plaintiff, and assessed plaintiff's damages at $1,383.66. Judgment was entered for this amount, from which the defendant appeals.

The principal question in this case is: Did the defendant by its conduct permit John E. Armstrong to appear as the agent of the defendant in the transaction of business with the plaintiff so as to be estopped to deny such agency? It appears as a part of the plaintiff's evidence that he called at the Midland Club rooms, passed through the lobby of the Club, and took an elevator to the fourth floor, where the Executive Offices of the Club were located, including the auditing office, switchboard room and the Midland Target publication office.

The plaintiff called on Mr. McKeen, the Secretary of the Club, and thereafter took up the matter of printing the Midland Target magazine with Armstrong, in one of the executive

(Appellee)

(Appellant)

Motion filed Dec. 3, 1931

offices of the Club on the fourth floor. No name appeared on the office door. There was no other business office on this floor but that of the Club. After an arrangement was entered into for the printing of the publication, six issues of the magazine were printed by the plaintiff from September 26, 1928 to and including April 29, 1929, and these magazines were distributed to the members of the Club in envelopes run through the Club addressograph and furnished to the plaintiff. A charge of $3.50 a month for the magazine was made on the house account of each member of the Club. There is no doubt that the Club magazine, for which the members were charged on their house accounts, was printed by the plaintiff and received by the members, and that the money when paid by its members went into the Club funds.

The defendant attempted to show by a contract entered into between the defendant and John F. Armstrong that Armstrong was the publisher of the magazine and that the Club assumed no liability. Upon objection, this contract was not admitted in evidence. The plaintiff was not a party to the contract, was not bound by its terms, and was never notified that he must look to Armstrong for the money due or to become due for the printing of this magazine. The plaintiff when he entered into the undertaking had a right to rely upon Armstrong's apparent authority. In the instant case the defendant invited the plaintiff to its office to transact business in which it was engaged. It was the duty of the Club to have someone there as long as its offices were kept open, who was empowered to transact business, or at least to give information in regard to its business. The plaintiff had a right to assume that the parties in charge of the offices were the agents of the Club and that they could act with authority in matters relating to its business. Eclectic Life

Insurance Co. v. Fahrenkrug, 68 Ill. 463. Therefore, under the facts in this record the defendant is estopped to deny the agency of Armstrong to the injury of the plaintiff, who dealt in good faith with the agent on his apparent authority.

The conclusion of this court is supported by the rule and by the weight of authorities cited in 2 Corpus Juris on page 461. The rule is in these words:

> "General Rule. The same acts and conduct on the part of a principal that, when so intended, work an implied appointment often estop the principal to deny an appointment when no actual agency was intended. Accordingly, it is a general rule that when a principal by any such acts or conduct has knowingly caused or permitted another to appear to be his agent either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances, although no consideration moved to the alleged principal, and although there was no actual fraud on the part of such principal, as the estoppel may be allowed on the ground of negligent fault on his part, on the principle that where one of two innocent persons must suffer loss the loss will fall on him whose conduct brought about the situation."

From the evidence in the instant case, the work necessary to carry on the printing of the publication of this magazine was furnished by the defendant to the plaintiff, and there is no evidence that Armstrong or any officer of the defendant Company notified or advised the plaintiff that he must look to Armstrong for the payment of his bill in printing the Midland Target magazine.

There are several statements in the record from which it appears that the account was charged by the plaintiff to the Midland Target. A form was used by the Club in billing its members, headed in part, as follows:

> "Midland Club
> Chicago
> Midland Target
> Official Publication of the Midland Club."

This, together with the evidence in the record, would

[illegible]

indicate that the work of printing this magazine was done for the defendant, and that it derived a benefit therefrom.

In finding the issues for the plaintiff, the trial court was fully warranted, and the judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

35360

LOUIS E. NELSON, Receiver of the Citizens State Bank of Melrose Park, Illinois,	)	INTERLOCUTORY APPEAL
Appellee,	)	FROM CIRCUIT COURT, OF
v.	)	
MARGARETH THIELE,	)	COOK COUNTY.
Appellant.	)	263 I.A. 654

OPINION FILED DECEMBER 2, 1931

MR. PRESIDING JUSTICE HEBEL delivered the opinion of the court.

This case is before the Appellate Court upon an interlocutory appeal from an order appointing a receiver.

The bill to foreclose in this case is based upon a trust deed securing the payment of $100,000, and to secure such payment the defendant, Margareth Thiele, conveyed to the Chicago Title & Trust Company, as Trustee, an 80-acre tract of land situated at the corner of 22nd Street and Wolf Road in Hillside. The land is improved and operated as a daily fee golf course.

The bill of complaint charges that default was made in payment of interest due on January 15, 1931; that the interest remains unpaid; that the principal note and balance of interest are now due and payable by the exercise of the option of complainant, as provided for in the trust deed; that the premises are scant security for the indebtedness, and that the defendant is insolvent.

A petition in support of complainant's motion for the appointment of a receiver was filed, in which petition it is alleged that in and by said trust deed, the rents, issues and profits of said premises were conveyed to the trustee in said Trust Deed, and it was agreed that in case of foreclosure, the court might at once and without notice, appoint a receiver, with power to collect the rents, issues and profits during the pendency of such foreclosure

suit, for the benefit of the legal holders of the indebtedness.

The defendant, Margareth Thiele, filed an answer to this petition, which is to the effect that the $100,000, loan, secured by the Trust Deed, was given as an accommodation, and was to take up a $42,500, mortgage, in the possession of the Bank; that this mortgage was subordinated to the lien of the Trust Deed securing the $100,000 note, now being foreclosed; that the Bank never gave her credit for said paper, and that the defendant is entitled to have one or the other of said mortgages released.

The defendant also filed her answer to the bill of complaint, and it is substantially the same as the answer filed to the petition.

The motion for the appointment of a receiver was partly heard on June 10, 1931, Evidence both oral and written was submitted, and the Court continued the hearing to July 10, 1931, and included in the order of continuance these words: "and the payment of rentals due from the lessee of the Golf Course is to be withheld until July 10, 1931, or until the further order of the Court."

On June 13, following, as a result of oral representations made by complainant's solicitor to the effect that the Golf Course rentals had been paid to Charles J. Wolf, as agent of Margareth Thiele, prior to the hearing of June 10, 1931, and that Charles J. Wolf, who appeared as a witness, remained silent and did not make known the fact that the rents had been collected by him, the Court set aside the order continuing the case, and appointed a receiver, refusing to hear further evidence of the defendant.

The evidence heard by the Court and offered by the defendant was to the effect that the real estate is worth at least $300,000. The complainant contends, however, that the value, according to a certificate filed and signed by Cyrus F. Campe, was

[illegible]

[illegible]

this [illegible]

secured by [illegible]

to take up [illegible]

that [illegible]

accurate [illegible]

never gave [illegible]

entitled to [illegible]

[illegible]

overplaint, [illegible]

to the [illegible]

[illegible]

partly based on [illegible]

submitted, [illegible]

and [illegible]

payment of [illegible]

although [illegible]

Court."

[illegible]

[illegible] by [illegible]

Court [illegible]

[illegible]

Ohrtlee [illegible]

did not [illegible]

him, [illegible]

a [illegible]

[illegible]

[illegible]

"30,000. [illegible]

[illegible]

fixed at $160,000. It also appears from this certificate that the property is improved with an 18-hole fee golf course, in good condition; an old frame "Turner Hall" used as a club house; a brick and stone roadhouse used as a restaurant, and several old sheds; that the golf course is rented on a graduated rental, payable quarterly at the following rates; October 1, 1930 to October 1, 1931, $2,062.50; October 1, 1931 to October 1, 1932, $2,250.00, and October 1, 1932 to October 1, 1933, $2,437.50; that in addition, the tenant is to pay 75/80 of the taxes and assessments; and that there is a further income of $250.00 per month from the tenant of the roadhouse.

The complainant contends that where the provisions of a trust deed constitute a mortgage of the rents, issues and profits, a contract of that kind will be enforced in equity, to which the defendant replies that the appointment of a receiver is an extraordinary remedy given by equity to protect and preserve property and is justified only where the record affirmatively bespeaks an imminent danger of loss.

This Court has held that a provision, such as the one in this trust deed, where certain rents are mortgaged as part of the security, is not conclusive upon the chancellor upon a motion for the appointment of a receiver, and while such a provision is entitled to weight, the court should consider all the equities of the case in making such an appointment. This rule is fully considered in the case of Thomas v. Damond, et al, number 35311 Appellate Court, opinion filed June 24, 1931, where the court says:

> "Complainant seems to contend that a receiver should be appointed solely upon the ground that the trust deed conveyed the rents and profits as part of the security. We have repeatedly held that such provisions are not conclusive upon the chancellor upon such a motion; that while they are entitled to weight, the chancellor should consider all the equites of the case. Bothman v. Lindstrom, 221 Ill. App. 262. Such provisions are not sufficient where it would be inequitable to appoint a receiver. If the property is

ample security a receiver ought not to be appointed. Bagley v. Illinois Trust & Savings Bank, 199 Ill. 76; Aetna Life Ins. Co. v. Broeker, 166 Ind. 576; Davis v. Blair, 252 Ill. App. 417; Grabowski v. MacLaskey, 257 Ill. App. 484; Chicago Title & Trust Co. v. McDowell, 257 Ill. App. 492; Reliance Bank & Trust Co. v. Skamski, number 35042, Appellate Court opinion filed May 19, 1931. We are in accord with what is said in Aetna Life Ins. Co. v. Broeker, 166 Ind. 576;

> 'The appointment of a receiver is a remedy; it is a part of the procedure of courts of chancery to conserve and enforce equitable rights, but it is not an equity in itself, and parties cannot bargain concerning the exercise of the jurisdiction. Such provisions, no doubt, may be entitled to some weight upon the application, but a court of equity will not enforce them where it would be inequitable or unconscionable so to do.'

Also in Brick v. Hornbeck, 43 N. Y. Supp. 301:

> 'Unless the land is inadequate security, the appointment of a receiver is an unnecessary annoyance and hardship. * * * Parties may not by contract impose an obligation upon courts in such a respect. Extraordinary remedies are not resorted to unless required in order to do full justice. It is for the court in every instance to determine whether it should take upon itself such a trust, and whether it should do so in a case like this depends upon whether it is necessary for the security or protection of the mortgagee.' "

In the instant case no allegation is made as to the value of the real estate, and the bill of complaint is silent upon the question of the payment of taxes. There is some evidence as to the value of the land, and also as to the taxes not having been paid; the payment of which taxes is subject to the disposition of objections filed by the defendant in the County Court.

It would have been better practice if all the evidence upon the hearing of the motion for a receiver had been heard by the court, in order to arrive at the value of the property. The only charge of default in the bill is that payment of an interest note was not made and the premises are scant security for the indebtedness. Undoubtedly, the verified bill and the sworn petition of the complainant were considered by the court in entering an order for appointment of the receiver. The charges made therein are not sufficient to justify such appointment.

value of the real estate, and the [illegible] of the question of [illegible] the value of [illegible] the payment of [illegible] upon the [illegible]

[illegible] upon the [illegible] court, [illegible] [illegible] not [illegible] [illegible] [illegible] of the [illegible] justify such [illegible].

However, upon a proper showing, the court may again consider the equities in the case if a further application is made for the appointment of a receiver to collect the rents, issues and profits arising out of the land.

For the reasons indicated, the order appointing a receiver is reversed.

ORDER REVERSED.

FRIEND AND WILSON, JJ. CONCUR.

35405

FRED P. HEITMAN, Appellee, v. JULIUS E. EVERSEN, et al., (Defendants),	INTERLOCUTORY APPEAL FROM CIRCUIT COURT COOK COUNTY.
LENA LOMANTO, individually and as Guardian of Joseph Charles Lomanto and Sarah Ruth Lomanto, Minors, Appellant.	263 I. A. 554

OPINION FILED DECEMBER 2, 1931

MR. PRESIDING JUSTICE REBEL delivered the opinion of the court.

This is an interlocutory appeal by certain defendants from an order appointing a receiver to the property described in the bill of complaint.

The bill charges that Julius E. Evensen and wife executed and delivered three promissory notes, dated June 13, 1927, for $1,000. each, payable in two, three and four years after date; and three notes for $5,000. each, payable in five years and secured by a trust deed conveying the described real estate to Heitman Trust Company, as trustee.

The bill also charges that payment was made of the two principal notes and of all interest notes prior to June 13, 1931, and that default was made in the payment of the interest notes and the one principal note due on June 13, 1931, and that the trustee elected to declare the whole of the remaining principal and interest notes, aggregating $16,480.00, due and payable.

It is further charged that the taxes for 1928 on the premises, are unpaid and amount to $431.02, $100.00 of which was paid, and that objections were filed with the Board of Review as to the

OPINION FILED DECEMBER 8, 1921

of the court.

from an order [illegible]

the bill of complaint.

[illegible]

executed [illegible] three [illegible]

for [illegible] month, [illegible] in [illegible]

and three notes for [illegible] each, [illegible]

by a trust deed [illegible] the [illegible]

Company, as trustee.

[illegible]

two [illegible] notes and [illegible]

and the [illegible]

the one [illegible]

elected to [illegible]

notes, [illegible]

It is further [illegible]

premises, [illegible]

and that objections were filed [illegible]

remainder; that the complainant was informed that the taxes for 1929 were unpaid and that the premises have been sold, or are about to be sold; that the real estate is improved with a three-story brick building containing three six-room apartments and a garage; that the premises are scant and meager security, and that the rents are pledged as additional security; that on August 11, 1931, the complainant served a notice on all the defendants, and that copies were served on the two infant owners, Joseph Charles Lomanto and Sarah Ruth Lomanto, minors, by leaving copies with Lena Lomanto, their mother and guardian; that the title became vested in Charles A. Lomanto, who died in 1928, leaving his widow and the two children hereinbefore named.

The bill fails to state the value of the property, the income therefrom, or that waste has been committed, except to charge that the premises are scant and meager security for the indebtedness.

It is apparent that the Court considered the verified bill of complaint and appointed the receiver named in the order; that bonds were filed by both the complainant and the receiver, which were approved prior to the perfecting of this appeal. While the appearance of the complainant was filed in this case, there was failure to file a brief in his behalf.

It is a conclusion of the pleader to charge, as was done in this bill, that the property was scant and meager security for the indebtedness. Upon that charge alone it is not equitable for the court to appoint a receiver although the rents and profits are pledged as additional security. It must appear from the verified bill, or the petition, or from the evidence heard by the court, that the facts justify the conclusion that the value of the property is not ample security for the payment of the indebtedness and that the equities

are with the complainant. The conclusions of the pleader are not of evidentiary value, and never justify the appointment of a receiver. The fact that the rents and profits are pledged in the trust deed as part of the security, is not conclusive upon the Chancellor. While it is entitled to weight, all the facts should be set forth and considered before the Court orders the appointment of a receiver.

In the case of Hannah Frank v. Max Siegel, et al., No. 35361, Appellate Court, the Court in its opinion passed upon the question that is before this court in the instant case, and we there state:

> "In this court we have repeatedly held that the pledge of the rents in the trust deed is not conclusive upon the chancellor upon theapplication for the appointment of a receiver; that while it is entitled to weight, all the equities of the case should be considered and that it would be contrary to the nature of a court of equity to enforce the exact letter of the contract of mortgage regardless of the necessities or equities involved. Rothman v. Lindstrom, 221 Ill. App. 262; Grabowski v. MacLaskey, 257 Ill. App. 484; Chicago Title & Trust Co. v. McDowell, 257 Ill.App. 492; Reliance Bank & Trust Co. v. Samski, number 35042, Appellate Court, opinion filed May 19, 1931; Thomas v. Damond, number 35311, Appellate Court, opinion filed June 24, 1931.
>
> We conclude that, as a court of equity will not enforce specific performance of every contract regardless of whether or not so to do would be unconscionable, so the provisions of a trust deed for the appointment of a receiver should not be enforced unless equitable considerations so require. That the request for a receiver is an appeal to the conscience of the court and not a demand based upon any agreement of parties purporting to restrict the discretion of the chancellor. The possession of a receiver is the possession of the court and parties cannot by contract impose this burden of administration upon the chancellor regardless of the necessities of the situation."

According to the order, the trial court finds, in effect, from the verified bill and the evidence, that notice of the motion for the appointment of a receiv r was given to all parties; that by the terms of the trust deed mentioned in the bill of complaint it is provided that upon the filing of a bill of foreclosure the court may at once appoint a receiver for the benefit of the legal holders of the indebtedness secured,and that in and

by the trust deed the rents, issues and profits are pledged as additional security. This is not enough and does not meet the requirements as laid down by the authorities cited herein, and the court therefore improvidently entered the order appointing a receiver.

The defendant contends that the order affects the rights or property interests of an infant and is erroneous, and that the court was without jurisdiction until the return of the service of summons and the appointment of a guardian ad litem. The record shows that Lena Lomanto appeared individually and as guardian of Joseph Charles Lomanto and Sarah Ruth Lomanto, minors. However, it will not be necessary to consider this question, for the reason that we have concluded in this opinion that the order was erroneously entered by the court on other grounds.

The order is reversed.

ORDER REVERSED.

FRIEND AND WILSON, JJ. CONCUR.

35617

CHICAGO TITLE AND TRUST COMPANY, a corporation, as Trustee under Trust deed dated February 3, 1926, and recorded in the Recorder's Office of Cook County, Illinois, on February 26, 1926, as Document No. 9191009,

Appellee,

v.

CHARLES C. WEINZ, et al,

APPEAL OF HARRY COOK, Defendant (Appellant), from Interlocutory Order entered August 14, 1931, appointing Receiver,

Appellant.

APPEAL FROM INTERLOCUTORY ORDER OF CIRCUIT COURT, COOK COUNTY, APPOINTING A RECEIVER.

263 I.A. 654

Opinion filed Dec. 2, 1931

MR. PRESIDING JUSTICE HEBEL delivered the opinion of the Court.

This is an appeal by the defendant Harry Cook, from an interlocutory order entered on August 14, 1931, appointing a receiver in a proceeding to foreclose a trust deed. The order was entered upon the motion of the complainant without any showing other than that contained in the sworn bill of complaint.

The bill of complaint is for the foreclosure of a trust deed given to secure an issue of bonds, signed by Charles C. Weinz, originally aggregating $100,000, upon which the sum of $15,000 has been paid. It is further charged that to secure said bonds, said Weinz conveyed to the complainant as trustee the real estate described in said bill, together with all buildings and improvements thereon, and the rents, issues and profits that shall at any time accrue from said premises. The bill further charges default in the payment of bonds, aggregating $2500; and default in the payment of interest, aggregating $2762.50, which matured on

Opinion filed Dec. 3, 1931

February 3, 1931, except that there has been deposited the sum of $920.86; the election to declare the whole of the principal sum immediately due and payable; that the complainant filed said bill for the purpose of foreclosing said trust deed for the satisfaction of all of the unpaid bonds and interest coupons secured thereby, and that the defendant Harry Cook is the owner of said premises; that the mortgagor shall be permitted to use, occupy and possess the premises, and to collect, use and control the rents, income and profits thereof until default be made in the payment of some portion of the indebtedness. The bill further charges that in and by the trust deed the mortgagor agreed that in case of the filing of a bill to foreclose the trust deed, a receiver might be appointed by the Court at the time of the filing of said bill, to have immediate possession of and to operate and lease said premises and property, and to collect the rents and income therefrom during the pendency of the suit. In the bill of complaint there is no charge setting out the value of the premises, so that the court could determine from the verified bill whether the mortgaged premises were scant security for the payment of the indebtedness, but there is the charge that the rents, issues and profits that shall accrue from the premises are specifically conveyed and assigned to the trustee.

The complainant rests upon its contention that where the trust deed conveys the rents, issues and profits not as additional security, but as a direct part of the security, they constitute a primary fund, and may be applied equally with the land for the payment of the debt, and that upon default the complainant is entitled to the appointment of a receiver without regard to the question of the adequacy of the security. Upon an examination of the opinion in the case of Rohrer, v. Deatherage, 336 Ill. 450, which is relied upon by the complainant as authority for its position, we find that the court in that case holds that the owner of the

February 5, 1921, [illegible] to [illegible]
2320.26; the [illegible] to [illegible]
immediately due and payable [illegible]
for the [illegible] of [illegible]
of all of the unpaid bonds [illegible]
that the defendant [illegible]
the mortgagor shall [illegible]
dramshops, and to solicit, [illegible]
profits thereof until default [illegible]
of the indebtedness. [illegible]
trust [illegible]
bill to foreclose [illegible]
the court at the time of [illegible]
possession of [illegible]
and to [illegible]
of the suit. [illegible]
but the value of the premises, [illegible]
from the verified bill showing the [illegible]
security for the [illegible] of the indebtedness, [illegible]
charge that the rent, issues [illegible]
the premises [illegible]

The [illegible]
the trust deed covering the [illegible]
additional security, [illegible]
constitute [illegible]
for the payment of the [illegible]
is entitled to the [illegible]
[illegible] of the mortgagor or [illegible]
the [illegible] in the case of [illegible]
is relied upon [illegible]
[illegible] that the court is [illegible] the court of the

equity has the right to receive the rents for his own use until the mortgagee takes steps to enforce his lien upon the rents and profits after default and when a receiver is actually appointed; and, further, that while the mortgagor conveys title, as between the mortgagor and the mortgagee, the title is not absolute, but only conveyed to secure the creditor during the existence of the debt, and the mortgagor is regarded as the owner of the land for all beneficial purposes, subject only to the rights of the mortgagee. Therefore, it is but reasonable to conclude from the opinion of the court that where the rents, issues and profits are assigned to the mortgagee or trustee, such assignment is qualified to the extent that they are additional security during the existence of the indebtedness, and that where the title to the premises is conveyed to the trustee, as in the instant case, it is a qualified title to secure the indebtedness and it must necessarily follow that the assignment of the rents and profits is, for the purpose of affording additional security.

We have held in this court that the question of the appointment of a receiver is addressed to the conscience of the court, and cannot be controlled by the agreement of the parties which purports to restrict the discretion of the chancellor. Frank v. Siegel, Opinion No. 35361, filed in the Appellate Court on October 29, 1931.

The bill does charge a default in the payment of matured bonds aggregating $2500, and interest coupons aggregating $2762.50, but does not charge that there was default in any other respect. It appears, however, from this bill, that the $100,000 indebtedness has been reduced by $15,000.

While the assignment of the rents provided for in the trust deed will be considered by the court as entitled to weight, still the court will not enforce the exact letter of the

provision in the trust deed, regardless of the failure to charge by proper facts the necessity for the appointment of a receiver. Frank v. Siegel, supra.

It is logical to hold that the complainant should charge in its bill such facts as will justify the court in the exercise of its discretion in appointing a receiver to take possession of the property from the owner.

For the reasons indicated in this opinion, the charges in this bill of complaint are not such as would justify the court in appointing a receiver, and, therefore, the order was improvidently entered, and is reversed.

ORDER REVERSED.

FRIEND AND WILSON, JJ., CONCUR.

34873

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
v.
JOHN DAVID SHERIDAN, JR.,
Plaintiff in Error.

ERROR TO
CRIMINAL COURT
OF
COOK COUNTY.

Opinion filed Dec. 2, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

John David Sheridan, Jr., was on October 24, 1930, adjudged by the Chief Justice of the Criminal Court of Cook County to be guilty of contempt of said court because of certain testimony given by him before the October, 1930, Grand Jury of said court, and was sentenced to ten days confinement in the county jail.

The proceedings for contempt were called to the court's attention by means of a motion and petition alleging in substance that defendant had on October 15, 16, and 17, 1930, testified before the Grand Jury with reference to an inquiry then being conducted by said Grand Jury, and that his testimony was in certain respects untrue, evasive, wholly irresponsive and so couched as to obstruct and delay the investigation by said Grand Jury. The petition alleges that defendant's testimony "was material and pertinent to the inquiry then being conducted by the said Grand Jury with reference to the Coal Hikers' Union, Local #701, and the Chicago Coal Teamsters' Chauffeurs' and Helpers' Union, Local #704, and the Chicago Dealers' and Helpers' Union, Local #707."

That part of the order of commitment which states the specific facts constituting the contempt, reads as follows:

> "Did testify and say in substance and effect that at no time was he ever, directly or indirectly, connected with the Chicago Coal Hikers Union, Local No. 701, or the Chicago Coal Dealers and Helpers Union, Local 707, and that he had never received any moneys, remuneration or compensation

[illegible]

[illegible]

v.

[illegible]

[illegible]

Opinion filed Dec. 2, 1921

[illegible]

[illegible]

adjudged by the trial justice [illegible]

to be guilty of contempt of [illegible]

given by his a lore the [illegible]

was sentenced to [illegible]

[illegible]

court's attention by [illegible]

stance that defendant [illegible]

before the grand jury [illegible]

by said trial jury, [illegible]

nature, evasive, [illegible]

and delay the [illegible]

that defendant's testimony [illegible]

then being committed [illegible]

[illegible]

[illegible]

and [illegible]

[illegible]

specific [illegible]

[illegible]

for services rendered by him from either of these unions or for any other purpose; that the said John David Sheridan Jr., did further testify and say in effect and substance that he had no knowledge as to how the said Chicago Coal Hikers Union, Local No. 701 and Chicago Coal Dealers and Helpers Union, Local 707, was organized and did not know whether or not said unions were connected in any way with the Chicago Coal Teamsters, Chauffeurs and Helpers Union, Local 704, by whom the said John David Sheridan, Jr., was employed as a clerk. * * * *

Did testify and say, in substance and effect, that he did not recall ever having received any check or checks made out to currency or to himself, the said John David Sheridan, Jr., either directly or indirectly, from one George Barker or signed by said George Barker, and did not recall ever having cashed a check or checks signed by said George Barker. * * * *

Did thereupon testify and say in substance and effect that he had been paid half of his wages of one hundred dollars ($100.00) per week, or fifty dollars ($50.00) per week from the treasury of the Chicago Coal Hikers Union, Local 701, and that arrangements had been made for him to receive his pay in this manner from one Mr. Lynch; that he had also occupied the same office with the clerk in charge of the Chicago Coal Dealers and Helpers Union, Local No. 707, and that the clerk of said Union, one Stanley Venesky, had been on the pay roll of the Chicago Coal Teamsters, Chauffeurs and Helpers Union, Local No. 704, for whom he the said John David Sheridan, Jr., was clerk; and by his answers otherwise indicated that the said Chicago Coal Hikers Union, Local No. 701, and the Chicago Coal Dealers and Helpers Union, Local No. 707, were closely connected with and a part of the Chicago Coal Teamsters, Chauffeurs and Helpers Union, Local No. 704; that he had also received numerous checks signed by George Barker, together with one Wilton Booth and had also received numerous checks signed by George Barker only, said checks being filled out by him, the said John David Sheridan, Jr., in his own name and that he cashed many of said checks; that one of said checks signed by said George Barker only was for one thousand eight hundred and fifty dollars ($1,185.00) and that he cashed said check for the said George Barker and made a payment on an automobile for the said George Barker with the moneys so received.

That all of said conduct of the said John David Sheridan, Jr., took place before the said Grand Jury while in session and before this court while in open session and the said evasive and dilatory attitude of said John David Sheridan Jr., and the said false and contradictory statements and the giving out of perjured testimony was contumacious and tended to impede, obstruct and interrupt the proceedings and to lessen the dignity of the court and was calculated to and did impede, embarrass and obstruct this court in the due administration of justice;

That all of the questions asked of the said John David Sheridan, Jr., before said Grand Jury and the answers given by said John David Sheridan, Jr., were material and pertinent to the inquiry then being conducted by the said Grand Jury with reference to the Chicago Coal Hikers Union Local No. 701, the Chicago Coal Teamsters, Chauffeurs and

Helpers Union, Local No. 704, and the Chicago Coal Dealers and Helpers Union, Local No. 707, and the conduct of the affairs of said union."

As grounds for reversal, it is urged first that the petition wholly failed to charge any conduct of defendant before the Grand Jury which constituted contempt. More specifically it is contended that there is no allegation in the petition that the Grand Jury was investigating any complaint or charge or any crime that had been committed in Cook County, or was triable in Cook County, and also that the petition is silent as to the object of the questions put to defendant before the Grand Jury. We cannot agree with this contention, however, as the allegation of the petition heretofore quoted seems to us to sufficiently refer to the subject matter of the inquiry, and states that defendant's testimony was material and pertinent thereto. Moreover, it was not necessary for the State's Attorney in the case at bar to have filed a petition. He might, in lieu of a petition, have made a motion before the Chief Justice, asking that defendant be committed for a direct contempt of court, as was done in the case of Berkson v. People, 154 Ill. 81. In any event, defendant was not prejudiced by the filing of the petition, but on the contrary the petition made a more complete record upon which the Chief Justice was enabled to act. The vital part of proceedings such as these is the order of commitment, and that, as will appear form the portions of the order heretofore fully set up, specifically recites facts constituting the contempt, and also alleges that the questions and answers involved in defendant's testimony were pertinent and necessary to the investigation then pending.

It is next urged that the evidence fails to show that any complaint or charge of crime was being investigated by said Grand Jury when Sheridan's testimony was heard. The Grand Jury, particularly in any jurisdiction where crimes above the grade of

misdemeanor can only be prosecuted by indictment, is a necessary, constitutent part of every court having general criminal jurisdiction, and must necessarily be to a large extent under the control and subject to the direction of the court, and the court, where occasion exists, may charge them to investigate and make presentments upon any matter given into its charge. As was said in the case of People v. MC Cauley, 356 Ill. 504:

> "There is nothing in the statute that suggests to our minds that the Grand Jury, when thus lawfully reassembled, would not have the power to investigate and make presentments upon any matter which might be given in its charge."

It is also pointed out in the McCauley case that in the absence of any showing in the record to the contrary, it will not be presumed, upon writ of error to reverse a judgment of conviction, that the Grand Jury considered and acted upon matters not properly before it.

The other grounds for reversal urged by defendant have to do with the evidence given before the Grand Jury, the findings of fact in the court's order, and the lack of intention by defendant to assail the dignity of the court and interfere with its procedure or the due administration of justice. We have carefully examined the record in this case, and are of the opinion that the court's specific findings are amply sustained by the record. Defendant's testimony was evasive, often wholly irresponsive, in many respects untrue, as admitted by him in at least one instance, and his answers were so couched as to hinder and delay the investigation then being conducted. This, we believe, is sufficiently shown by the specific findings of the order, and the record here presented.

We are unable to find any error in this proceeding and the judgment of the Criminal Court will therefore be affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

34901

CHICAGO WATER PURIFYING COMPANY, a corporation,

Appellee,

v.

PALMER FLOOR COMPANY, a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

263 I.A. 655

Opinion filed Dec. 2, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

This is an appeal from an order denying defendant's motion, based on a sworn petition under Section 89 of the Practice Act, to vacate a judgment entered by default against defendant in the Municipal Court of Chicago on October 8, 1930, for the sum of $180.00.

The subject matter of the petition is two-fold: (1) it sets up facts which purport to constitute a defense to the original cause of action, and (2) it alleges the violation of an agreement on the part of counsel for plaintiff to continue the cause to a specific date and charges attorneys with fraud in "juggling" the files so as to prevent defendant's attorney from ascertaining the status of the case for trial.

With reference to that portion of the petition which alleges facts purporting to constitute a defense to plaintiff's cause of action, we regard the cases of Chapman v. Northamerican Insurance Co., 292 Ill. 179, and Morabia v. Thompson Hospital, 309 Ill. 147, as decisive. These cases and decisions cited therein announce the doctrine uniformly adopted in this state that the errors of facts which could be made the basis of a writ of error coram nobis and can now be made the basis of a motion under Section 89 of the Practice Act, are not errors upon such questions of fact as arise upon the pleadings in the original case, or questions of fact averred in the

Opinion filed Dec. 8, 1931

pleadings upon which issue might have been taken, or such questions of fact as constitute the basis of the cause of action or defense upon the merits of the case, or which might have been pleaded as a defense to the merits. This rule is clearly stated in the decisions cited and referred to in plaintiff's brief and defendant cites no authority to the contrary.

The only question, therefore, properly before the court is whether there were such mistakes or fraud outside the record as to require the court to set aside the judgment. Briefly stated, defendant's petition alleges that plaintiff's suit was originally returnable in the Municipal Court on June 9, 1930, that defendant had prior thereto filed its appearance and a demand for a trial by jury, and that on June 9, 1930, the cause was set for hearing on June 19, 1930; that on June 17, 1930, defendant's attorney called plaintiff's attorney on the telephone and in a conversation that ensued advised him he would be absent from the city on June 19, 1930; that as a defense to plaintiff's claim defendant would contend that the water filter installed by plaintiff was found to be defective, and that defendant, under the provisions of the contract between the parties, had cancelled and terminated the contract and directed defendant to remove the installation; that upon this statement of defendant over the telephone plaintiff's attorneys agreed to continue the cause to July 18, 1930, for the purpose of giving plaintiff an opportunity to make the installation operate satisfactorily and with the understanding, as alleged in the petition, that if the installation could not be rendered useful it was to be taken out by plaintiff; otherwise, if the machine was made to operate satisfactorily, defendant would pay the claim and the suit would be dismissed.

The petition then proceeds to allege that nothing was done by plaintiff prior to July 18, 1930, with reference to correcting

the defects in the operation of the filter; that defendant's counsel therefore appeared in Room 910 of the City Hall on July 18, 1930, but the case was not on call in that court room, nor in any other court room on that date; that defendant's attorney then made a search for the file to ascertain the status of the case but was unable to locate the same, and continuously thereafter during the months of July, August, September and October, 1930, continued his search, but without avail. In this connection, the petition makes insinuations, but not specific charges, with reference to the "disappearance" of the file, and the "juggling" of the case on the part of plaintiff's attorneys.

It appears from the record, however, that when the cause was reached for trial in the Municipal Court on June 19, 1930, plaintiff's counsel did procure a continuance from the court to October 8, 1930, and that on the last mentioned date, when the case was regularly reached on the trial call, defendant not being represented in court, a verdict and judgment was entered for plaintiff in the sum of $180.00.

It thus appears from defendant's own petition that its counsel lacked diligence in following the case and ascertaining for himself, as it was his duty to do, whether the continuance alleged by him to have been agreed to, was procured by plaintiff's attorneys as stipulated. The petition discloses that several months intervened between July 18th, the date alleged to have been agreed upon between counsel, and October 8th, when the cause was heard. There are no specific charges that plaintiff's attorneys had anything to do with the "disappearance" of the files in the proceeding. If it be true that the files could not be found, defendant's attorney could have ascertained the status of the case by calling plaintiff's attorneys, or consulting the court's docket or the clerk's minutes, and his

the defendants [illegible]

therefore [illegible] in [illegible]

but the [illegible]

court [illegible]

for the [illegible]

looks [illegible]

duly [illegible]

but with [illegible]

tions, but [illegible]

of the [illegible]

attorney.

[illegible]

cause [illegible]

plaintiff [illegible]

October [illegible]

[illegible]

in [illegible]

of [illegible].

[illegible]

counsel [illegible]

[illegible]

him to have been [illegible] to [illegible]

stated [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

failure to ascertain the facts from any of these sources indicates a clear lack of diligence. Section 89 of the Practice Act was not intended to correct errors of fact predicated on allegations such as these.

The only other question raised by defendant's brief is that plaintiff demurred orally to the petition. While the usual practice is to hear matters of this kind on affidavits or counter-affidavits, it is by no means the only way in which the question can be raised. It was held in Chapman v. North American Insurance Co., 293 Ill. 179, People v. Crooks, 326 Ill. 366, and Smyth v. Fargo, 307 Ill. 300, that the sufficiency of a motion such as this may be raised by demurrer.

We are of the opinion that the court properly denied defendant's motion to vacate the judgment, and the order of the Municipal Court is therefore affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

34929

EDWARD J. WILLETTE, Appellee, v. THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a corporation and THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation, Appellants.	)	APPEAL FROM SUPERIOR COURT COOK COUNTY.

263 I.A. 655

Opinion filed Dec. 2, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

Plaintiff brought suit in the Superior Court of Cook County to recover for injuries sustained by him, while he was operating a snow-plow, as motorman of the Chicago Surface Lines, across the tracks of defendant, Chicago Rock Island and Pacific Railway Company, which was struck by the engine and train of defendant, Baltimore and Ohio Railroad Company, running on said tracks as lessee of the Chicago, Rock Island and Pacific Railway Company. The case was tried before the court and a jury resulting in a verdict and judgment for $30,000.

The essential facts disclose that the accident occurred at the intersection of Vincennes Avenue and defendant's right of way in Chicago about 11:30 P. M. on December 27, 1929. Vincennes Avenue is a north and south street, intersected at right angles by the double tracks of the Chicago, Rock Island and Pacific Railway Company. The crossing is protected by a flagman and automatic flash-light signals and crossing bells. On the night in question, the snow-plow, operated by a crew of five men in charge of plaintiff, approached the railroad tracks from the north. There is another track of the defendant, Chicago, Rock Island and Pacific Railway Company, about 200 feet north of the crossing in

Opinion filed Dec. 2, 1931

question, which is elevated. It is conceded that the snow-plow stopped about 100 feet south of the subway under those tracks, and that another stop was made 25 feet north of the railroad crossing. In compliance with the rules of the street car company, the snow-plow crew were required to do their own flagging, regardless of railroad signals. After the second stop, John E. Stalzle, one of the crew, went forward, and after looking both ways, as he testified, and hearing no signal bells, and observing no flash-lights at the crossing, motioned to plaintiff, motorman on the snow-plow, to come ahead.

The snow-plow, which was operated by trolley, was about 30 feet long, with cabs at either end. Between these cabs there was a cylindrical tank about 10 feet in diameter, loaded with water or sand used as ballast to hold the car down when the plow was in use. When plaintiff received the signal to come ahead, he proceeded toward and over the crossing very slowly, about two miles per hour. The crew of the snow-plow testified that there was a head-light on the plow and the cabs thereof were enclosed by canvas curtains on the side which were fastened at the top. There is some dispute as to whether the curtain on the south cab was drawn. The wings of the snow-plow had been raised in order to pass under the elevated tracks of the Chicago, Rock Island and Pacific Railway Company, as the roadway underneath the elevated tracks is rather narrow. After the plow was stopped about 25 feet from the Vincennes Avenue crossing, the wings were lowered and plaintiff instructed his crew about proceeding over the railroad tracks. In order to get across the tracks, switch irons were placed under the low end of the blade or wing so it could be raised and to prevent it from catching anything protruding on the crossing. These switch irons were laid along the rails of the railroad tracks and the blade

question, which [illegible]. It [illegible]
sloped [illegible] a flat area of [illegible]
that [illegible]
in consequence [illegible] of [illegible]
plow over [illegible] to [illegible]
railroad signals. After [illegible]
of the [illegible], and after [illegible]
and bearing no signal [illegible], and [illegible] the [illegible]
crossing, [illegible] [illegible], [illegible]
case [illegible].

The accession, which [illegible]
about 20 feet long, [illegible]
there was a difference [illegible]
water [illegible]
was in use. [illegible]
proceeded [illegible]
our hour. The crew of [illegible]
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canvas curtains [illegible]
is some fight [illegible]
down. The [illegible]
under the elevated [illegible]
"alley" [illegible]
rather [illegible]. After [illegible]
vinegar [illegible] [illegible]
instructed his crew [illegible]
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it from [illegible]
[illegible]

of the snow-plow moved over the switch irons. The crew was using two such irons, which were three and one half feet long and between one half and three quarters of an inch in diameter. As soon as the blade had passed over one switch iron it was passed forward from one man to another, and again placed under the front of the blade.

They were thus proceeding very slowly across the tracks, and had gotten about half way over the crossing when according to the testimony of plaintiff and members of his crew, the crossing bells began to ring. All of the crew heard the bells at about the same time and, with the exception of plaintiff, looked toward the west and saw the train approaching about 400 or 500 feet away. Their testimony as to the estimated speed of the train varies from 35 to 50 miles per hour. They continued with their task of passing and placing the switch irons along the track until the train was almost upon them, when Stalzle yelled and they all ran or jumped to safety, uninjured, except plaintiff.

Plaintiff testified that he also heard the bells. He was familiar with the crossing and signals and estimated the approximate length of time that it would require the train to reach the crossing at about thirty seconds. He did not look to see if the train was approaching because as he stated "he wanted to get across" and "thought he could get across." The greater portion of the snow-plow had passed over the west bound rail and plaintiff evidently relied on the usual lapse of thirty seconds between the ringing of signal bells and the arrival of the train as sufficient time to cross safely. Defendants' train struck the plow toward the rear end and plaintiff was severely injured.

It appears from the evidence that the right of way of the Chicago Rock Island and Pacific Railway Company approaches the intersection at Vincennes Avenue by means of a sharp curve from the

the

northwest. The main line of the Chicago, Rock Island and Pacific Railway, running north and south, is located some 50 or 100 feet immediately east of Vincennes Avenue. The main right of way constitutes an interlocking system with the east and west-bound tracks, and the approach thereto as well as to the crossing at Vincennes Avenue, is controlled by means of semaphore signals operated through switch towers located along the right of way. Immediately to the west of Vincennes Avenue are two of these semaphore signals, one at Racine Avenue and the other at Morgan street. When both of these semaphores display green lights it indicates to engineers on approaching eastbound trains that the track is clear and that they may proceed with safety over the main north and south right of way of the Chicago, Rock Island and Pacific Railway Company, located just beyond Vincennes Avenue.

It also appears from the evidence that when both of the aforementioned semaphores display green lights, automatic electrical devices cause signal bells and flash-lights to operate at Vincennes Avenue when the approaching eastbound train passes a point 1507 feet west of the Vincennes Avenue crossing. Because of the intersection of the eastbound track with the main line just beyond Vincennes Avenue, the railroad company maintained a speed schedule for trains proceeding eastward toward the approach of the main line, not to exceed 15 miles per hour.

Defendants' train crew, as well as the switch tower operator, testified that they observed the green lights all the way from Racine Avenue, indicating a clear track. Defendants insist that, under the circumstances, the signal bells and flashes would operate automatically at Vincennes Avenue when the train passed over a point on the track 1507 feet west thereof, and that according to speedometers in the engine, the train was proceeding not to exceed the required schedule rate of 15 miles per hour. From these facts,

it is argued that it would take the train about one minute and twenty seconds, to reach Vincennes Avenue after the bells and lights began to operate, thus affording plenty of warning to plaintiff and the crew of the approaching train.

The evidence is equally clear, however, that if the semaphore at Racine Avenue reflected a red or yellow light, and the one at Morgan Street a green light, the signals would not commence to operate at Vincennes Avenue until the train passed the Morgan Street semaphore, which is approximately 400 or 500 feet west of the crossing. All the plaintiff's witnesses, including the crew and one disinterested person who was walking north along Vincennes Avenue and observed the collision, testified that no bells or signals were sounded until the train came around the curve from the northwest at Morgan Street, and that the speed of the train was greatly in excess of fifteen miles per hour. In support of this evidence as to the rate of speed, the record discloses the fact that the train in question was about one half hour late in leaving the Central Station and was running behind schedule when it reached the Vincennes Avenue crossing, thus indicating, as plaintiff contends, that the engineer was trying to make up lost time and proceeding at a rate of speed greatly in excess of the time schedule.

There is a conflict in the evidence as to how far the engine proceeded after the collision before it came to a stop. Plaintiff contends that it ran about 900 feet, while defendants insist that it stopped about 300 feet beyond the crossing. It seems to be conceded that a full stop could be made within 300 feet if the train did not exceed fifteen miles per hour. As bearing upon this question, the conductor of the train, which had two engines and fifteen cars and was approximately 1300 feet long, testified he was at the rear of the train when it stopped after the collision, stepped to the siding, and walked about 400 feet to the crossing.

It is argued that it would be a [illegible]
twenty seconds, to reach Vincennes [illegible]
began to overtake, that officials [illegible]
the crew of the approaching train.

The evidence is scanty [illegible]
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the one at Argos street [illegible]
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Argos Street crossbore, which is a [illegible]
west of the crossing. At the plaintiff's [illegible]
the crew was one discharged [illegible]
Vincennes avenue [illegible]
or signals [illegible] until the train [illegible]
the northbound at Argos street, and that [illegible]
greatly in excess of fifteen miles per hour. [illegible]
evidence as to the rate of speed. The [illegible]
the train in question was about one half [illegible]
central station and was running, behind [illegible]
Vincennes avenue crossing, [illegible]
that the engineer was trying to [illegible]
at a rate of speed greatly in excess of the city ordinance.

There is evidence in the [illegible]
engine proceeded a [illegible]
plaintiff contends that it was [illegible]
inasmuch that it should have [illegible]
to be considered by a jury. [illegible]
train did not exceed fifteen miles per hour. [illegible]
this question, the conductor of the train, which had two engines
and fifteen cars and was [illegible] feet long, testified
he was at the rear of the train when it [illegible]

Upon this evidence, plaintiff bases his contention that the train proceeded about 900 feet before it stopped. As against this, there is the evidence of the engineer that the train proceeded only about 300 feet after the collision occurred.

It is urged on behalf of defendants that plaintiff failed to exercise ordinary care for his own safety in proceeding over the crossing without first ascertaining for himself whether there was danger of an approaching train. Photographs in evidence disclose that there was an unobstructed view from the west, the direction from which the train approached, and defendants contend that when plaintiff stepped down from the snow-plow at a point 25 feet north of the crossing to instruct his crew as to the manner of proceeding over the tracks, he should have ascertained for himself whether or not there was any danger ahead, and that if he had looked he could have seen defendants' train in the distance. It appears from the evidence, however, that one or two minutes elapsed before plaintiff resumed his position as motorman on the snow-plow, and, therefore, we see no force to this contention, because as was stated in Key v. Carolina & N. W. Ry. Co., 147 S. E. 625:

> "It might add but little, if anything, to a traveler's safety for him to leave his automobile for the purpose of looking for a train and then, after returning to his car, attempt to cross the track, without opportunity for a later view. On going back to his vehicle, he might still have the same need of approaching the track and looking for a train that he had before his first examination, and after each such precaution might be no safer in going ahead than he was before."

Before proceeding over the track, Stalzle signalled plaintiff to come ahead. Stalzle had looked to ascertain whether any train was approaching and testified he saw none. While the view of the track toward the west is clear, it appears from the photographs in evidence that the right of way, just before approaching the curve toward Morgan Street, lies in an easterly and westerly

direction, and it may well be that the headlight on the engine, which plaintiff's witness characterized as very dim, could not easily be discerned while approaching in a easterly direction at a considerable distance north of the crossing, and just before it turned toward the southeast on approaching the curve. Furthermore, plaintiff relied on Stalzle's observation who signalled him to come ahead, and the question of whether or not this constituted negligence on his part was a fact properly submitted for the jury's consideration. It was so held in Harper v. Delaware L. & W. R. Co., 47 N. Y. Supplement, 933, where the court, under similar circumstances stated:

> "Whether or not the decedent had, in the exercise of reasonable care, a right to rely upon the information received by him from the conductor as to the absence of danger, was, I think, under the circumstances here presented, a question of fact."

It is further contended that the failure of plaintiff to look for the approaching train when he heard the signal bells ringing, and his attempt to get the snow-plow off the track rather than to save himself by jumping therefrom as did the other members of the crew, was the approximate cause of his injury. There is a sharp conflict in the evidence as to the speed of the train in approaching the crossing, and the length of time that elapsed between the ringing of the bells and the collision. Defendants contend that there was a lapse of approximately one and a half minutes. Plaintiff and witnesses, testifying in his behalf, insist on the other hand that not more than ten seconds intervened. Obviously, plaintiff did not know on which of the two tracks a train was approaching. To ascertain definitely the imminence of the danger, he would have had to look in both directions. These difficulties rapidly increased with each foot the snow-plow proceeded over the track. Plaintiff thought he could get across safely. The snow-plow, which was approximately 30 feet long, had, in fact, proceeded almost over the eastbound track. Only about six feet thereof remained north

of the track when the collision occurred. Plaintiff evidently relied on the lapse of 30 seconds, as he testified, in which to clear the track, having in mind the usual speed of trains at this point and the automatic safety controls, which, under ordinary circumstances, sounded signals when the train was still 1507 feet west of the crossing. Furthermore, it was incumbent upon him not only to exercise reasonable care for his own safety, but to save the snow-plow for his company, even though the effort exposed him to some danger, (Illinois Central Railroad Co., v. Siler, 229 Ill. 390) and also to avoid the danger, incident to any collision, of a part of the snow-plow striking one of his crew. In this emergency, it was a debatable question for plaintiff to determine whether he ought to proceed on the snow-plow and thus attempt to avoid this danger to others, or to think only of himself. It was also a debatable question whether or not the snow-plow could clear this crossing in about the same length of time that it would take plaintiff to look and then get off and reach a place of safety. Under similar circumstances, courts have held that several seconds do not always afford sufficient time for the eye to see, the brain to comprehend, and then to act. (Dobson v. St. Louis, San Francisco Railway Co., Mo. 10 S. W. 2d, 528 533.) In any event, we are of the opinion that the question of what plaintiff did or did not do in such an emergency, and whether he exercised the degree of care required of him under the circumstances, was a question of fact properly submitted to the jury.

Defendants complain of instruction number 32, which the court refused to submit to the jury. We believe this instruction was properly refused because it required the plaintiff to ascertain how far away the train was when the crossing signals commenced to ring when he was on the track of the oncoming train, whereas, there was evidence that the ringing of the signal was an assurance to the plaintiff that he would have a reasonable time to clear the track,

[illegible]

and if he could do so, there was no duty to look. Furthermore, the instruction does not correctly state the degree of care required of one finding himself in such an emergency, but charges him with the exercise of ordinary care instead of such care as would be required of one suddenly placed in a position of great danger.

Defendants submitted a number of special interrogatories and complain of Numbers 30 and 31, which were refused. Interrogatory Number 31 is subject to the same objection as instruction Number 32. Interrogatory Number 30 is substantially covered by interrogatory 34. We believe the court properly refused both of these interrogatories.

Defendants also complain of instructions Numbers 1 and 3, given on behalf of plaintiff. Instruction Number 1 related to the measure of damages and Number 3 to the degree of care required by plaintiff. We have examined these instructions, and are unable to find therein the objectionable features pointed out by defendants.

It is lastly urged that the amount of the verdict, $20,000, is excessive. Plaintiff had worked as motorman for 14 years. This was the only work that he was qualified to do. His average monthly wage was $200. At the time of the accident, he was 42 years of age, able-bodied and in good health. As a result of the accident, he sustained injuries to his joints, resulting in the tearing of nerves and tendons extending from one bone to another, and affecting the cartilage between the bones. Subsequent to the accident, and for a long time thereafter, he experienced severe pains in bending backward and forward at the waistline. When placing any weight on his left buttock while sitting, severe pains were caused. He testified that he could not lift his left leg as high as the seat of a chair, except by swinging the leg in a wide circle. When he remained on his feet for any length of time,

he became dizzy, and he felt a numbness in his left leg and hip. He also testified that he tired very easily while walking, and experienced a sort of lost motion in his hip and back. For months he walked with a cane. Some of his injuries, according to two medical experts, are permanent. In addition to the foregoing, he had a cut extending from the forehead back on the side six and one half inches in length, and another cut on the top of his head three inches long, both leaving permanent scars which are plainly observable. Three pieces of bone came out of his head where it was cut on top, and the bone on the side of his head became diseased in consequence of a cut. During the time plaintiff was in the hospital convalescing, he suffered severe headaches and dizziness. Plaintiff also sustained a cut one and one half inches long on the under side of his arm and about three inches above the wrist. According to the medical examiner of the Chicago Surface Lines, there is a loss of earning capacity, because plaintiff cannot stand on his feet more than one half the time required of a motorman, and he is unable to pass the requisite physical examination to return to his work. In the light of these facts, we do not regard the verdict of $20,000 as excessive. Griswold v. Chicago Railways Co., 253 Ill. App. 498, Kiewert v. Balaban & Katz, 251 Ill. App. 342.

Finding no reversible error, the judgment of the Superior Court will be affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

[illegible]

34939

ELMER A. RICH,

(Plaintiff) Appellant,

v.

EDWARD LEVIN, doing business as NORTH STAR LOAN BANK,

(Defendant) Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

128

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263 I.A. 655

Opinion filed Dec. 2, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

This is an appeal by the plaintiff from a finding and judgment entered by the Municipal Court of Chicago in a suit in trover tried before the court without a jury. The finding and judgment was against the plaintiff and in favor of the defendant.

Plaintiff's statement of claim sets out the usual common law count in trover, alleging ownership and loss of a lady's platinum diamond ring containing one large diamond and fourteen small diamonds, of the value of $1,000, the later loss and finding thereof by the defendant, the demand for return, and the conversion by the defendant. Defendant's affidavit of merits denies the diamond ring came into his possession and the damages claimed.

The facts, so far as they are essential to a consideration of the merits of this controversy, disclose that plaintiff had been a jeweler for many years at 5 East Washington Street in Chicago; that prior to July 18, 1927, a man had on several occasions come into his place of business for intended purchases; that on the aforementioned date he came in again, and when looking at rings, he took the diamond ring in question to the light in the front part of plaintiff's place of business to better examine the same, and thereupon ran out of plaintiff's store with the diamond ring, without paying therefor; that during the month of September, 1927, plaintiff, identified this man, known as George Fiedler, at the Detective

Opinion filed Dec. 3, 1981

Bureau of the Chicago Police Department as the one who stole his diamond ring; that plaintiff, along with Fiedler and several detectives, then proceeded to the place of business of the defendant known as a pawn shop at 515 North Clark Street in Chicago, where they interviewed a clerk named Banks in defendant's place of business. Fiedler, in the presence of Banks and the detectives, stated that defendant's pawn shop was the place where he had sold plaintiff's diamond ring. Upon production of the pawn ledger there appeared an entry on line seven of the record of a lady's platinum diamond ring containing one large diamond and fourteen small diamonds. When defendant's clerk was asked to produce the diamond ring described in the pawn record he stated it could not be produced as the ring had been sold to someone unknown.

Plaintiff's first ground for reversal relates to the filing of defendant's affidavit of merits. Defendant had, prior to the trial, obtained from the court an extension for filing the affidavit of merits for ten days. The affidavit, however, was actually filed one day after the expiration of the time fixed by the court. In this situation, plaintiff had the right to move the court that the affidavit of merits be stricken, and the question whether the motion should then have been allowed, had it been made, would have been a matter resting entirely in the discretion of the court. Plaintiff, however, made no such motion, but proceeded to trial upon the merits of the cause. It was not until the conclusion of plaintiff's case, that plaintiff attempted to take advantage of the late filing of the affidavit, and when the court's attention was called to the matter, it overruled plaintiff's motion seeking to take advantage of the late filing of the document in question. We regard the denial of the motion under these circumstances as equivalent to an order then made extending the time for filing the affidavit of merits. It was within the discretion of the court to do so, and

the court's ruling indicates that it so intended. In the case of Walter Cabinet Co., v. Russell, 250 Ill. 418, the defendant, without first obtaining leave of court, filed a statement of claim in set-off. There were various proceedings in the case before trial, culminating finally in a judgment in defendant's favor on the set-off. It appeared that the plaintiff in that case had previously moved to strike from the files the statement and affidavit of set-off "because they were not filed with the defendant's appearance and no leave given to file them." Plaintiff's motion was denied, however. In commenting on these circumstances, the court in its opinion, said:

> "It is not intended to hold that the action of the court in denying the motion of the plaintiff in error, on December 16, to strike the statement of set-off from the files was erroneous. The denial of this motion was equivalent to an order then made extending the time for filing the statement, and was within the discretion of the court."

Had plaintiff in the instant case desired to take advantage of the failure of defendant to file the affidavit of merits within the time allowed by the court's order, he should have made a motion to strike the same before proceeding to trial. His failure to do so, and submitting the cause to the court under the pleadings then on file, constituted a waiver, and when plaintiff made his motion for judgment nil dicit at the close of plaintiff's case, we believe the trial court properly exercised its discretion in overruling the motion.

The only other ground urged by plaintiff for reversal of the judgment relates to the evidence in the case. The burden of proving that plaintiff's property came into the possession of the defendant was, of course, on the plaintiff. This he attempted to do by first testifying that he accompanied Fiedler to defendant's store, and that Fiedler, who had admitted stealing plaintiff's property, there stated that he had sold the ring in question to defendant. On motion of defendant, this testimony was stricken, and we think

properly so. In the case of Cook v. Korshak, 301 Ill. 603, suit was brought in trover to recover the value of a diamond ring. It appeared in that case that plaintiff's son stole her ring and sold it to defendant. In commenting on the admissibility of statements made out of court by the thief to the effect that he had sold the ring in question to defendant, the court said:

> "This was hearsay evidence purely and was not competent against the plaintiff in error over his objection. Wallace was not a witness on this trial. It is a familiar rule of law that a vendor's declaration after he has sold an article of personal property is inadmissible against the vendee to impeach the vendee's title to the property. The fact that the vendor is a thief and has stolen the article can add no greater force to his declaration, and the fact that the declaration is made in the presence of the vendee does not render the evidence competent."

The plaintiff sought further to prove his case by stating that the description of the ring contained in the pawn ledger tallied with the description of the ring stolen from him. The ring could not be produced in evidence, of course, because, as defendant's clerk stated, it had been sold to some unknown person. In the course of plaintiff's examination, the court permitted plaintiff to state from the description of the ring whether it was the same article as that owned by him, to which he replied:

> "Well, I should say that I can't absolutely say it is my ring. There is no question in my mind, from the setting and the small diamonds and everything in there."

He was thereupon asked by his counsel:

> "Are you positive, Mr. Rich, whether or not that is the ring described - "

to which the defend nt's counsel objected, and the court in ruling on the motion said:

> "Sustained. He has already stated he couldn't be positive."

There was no other evidence to support the plaintiff's burden. It was necessary for plaintiff to show by a preponderance of evidence that defendant had received the property in question

and refused to return it. This plaintiff failed to do, and under the circumstances the court could not well have found otherwise than in favor of the defendant.

There appearing to be no error in the record, the judgment of the trial court will be affirmed.

AFFIRMED.

HEBEL P. J. AND GILSON, J. CONCUR.

34953

AMELIA REDLIN, et al,
(Complainants - Appellants,
v.
ALFRED M. ROZANSKI, et al,
Defendants - Appellees.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

Opinion filed Dec. 2, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

Amelia Redlin, Margaret Gutsky and Erick G. Lucht filed their bill of complaint in the Circuit Court of Cook County to set aside the alleged will of their mother, Laura Rozanski, deceased, alleging undue influence and lack of testamentary capacity. The chancellor directed the jury to return a verdict finding that the instrument in question was the last will and testament of the deceased, and thereafter entered judgment on the verdict. This appeal is prosecuted to reverse the judgment thus entered. It appears from a stipulation filed herein that no freehold is involved in the proceedings.

The bill of complaint alleges that the aforementioned complainants are the children of Laura Rozanski, deceased, who is alleged to have executed a certain instrument in writing, purporting to be her last will and testament on the 17th day of January, 1928; that she died on January 23, 1929, leaving her surviving the contestants and the descendant of one other deceased daughter, Emelia King, and Alfred Rozanski, the proponent of the last will and testament. The instrument in question, after making provision for the payment of debts and funeral expenses, devises and decrees to Alfred Rozanski, the testatrix's son, all the residue and remainder of her estate, and nominates him as executor of the will.

As grounds for reversal, contestants rely mainly on the evidence adduced at the hearing, which they contend was sufficient

Opinion filed Dec. 5, 1951

upon both the issue of undue influence and lack of testamentary capacity to present issues of facts for the determination of the jury, and that the court erred in directing a verdict sustaining the instrument in question as the last will and testament of Laura Rozanski.

The undisputed facts disclose that testatrix was about 80 years of age at the time of her death; that for a considerable period prior thereto, she had resided at the home of her son, Alfred; that she was mentally alert, industrious and physically well up to the time of her last illness, which was of rather short duration; that on January 17, 1929, while ill and confined to her bed, she requested that her son be called home and asked that he bring his lawyer with him; that Alfred arrived home late in the afternoon and Mr. Fleck, his attorney, came about seven o'clock in the evening. Prior to the execution of the will, a deed to certain lots in Wisconsin had been executed by testatrix, in the presence of Helena M. Brush, Helen Krauss and Harry A. Fleck, Alfred's attorney. The will in question was thereafter drawn in the handwriting of Fleck and executed between 7 and 8 o'clock P. M. on that day. Alfred Rozanski was not in the room when the will was executed by his mother.

Upon the trial of the cause, proponents of the will called Helen Krauss and Helena M. Brush, who were subscribing witnesses to the instrument in question. Both of these witnesses testified to the usual statutory formalities required for the execution of a will, and stated that in their opinion the testatrix was of sound mind and memory at the time the will was executed.

Merton O. Jones was next called as a witness on behalf of proponents, and testified that he is a clerk employed by the Bowmanville Bank; that he first met Laura Rozanski on January 17, 1929, at her home between 4 and 4:30 o'clock in the afternoon; that she was in bed at the time, and there were present Alfred Rozanski,

[illegible]

[illegible] capacity to endure [illegible] and that the [illegible] instruments [illegible] concerned.

[illegible]

about 60 [illegible] able [illegible] lifted; in a [illegible] up to the time [illegible] torsion [illegible] bon, she [illegible] bring the [illegible] afternoon [illegible] the evening [illegible] lots in [illegible] of paper [illegible] [illegible] within [illegible] day. Alfred [illegible] by his mother.

[illegible]

called [illegible] to the instrument [illegible] to the [illegible] will [illegible] [illegible]

[illegible]

of [illegible] months [illegible] [illegible] 1967. [illegible]

Helen Krauss and another person unknown to him; that he asked the testatrix whether it was her wish to allow her son Alfred to enter her safety deposit box at the bank, to which she replied in the affirmative; that the witness then advised her that it would be necessary to see her make her mark on a written authorization for that purpose, which he had drawn up, and that Laura Rozanski then signed the paper presented to her by the witness with her mark. The witness stated it to be his opinion, based upon the conversation thus related, that textatrix was at that time of sound mind and that she knew what she was doing.

Mrs. R. B. Shewfelt, another witness called on behalf of proponents, testified that she had known the testatrix for about five years prior to her death, and that they visited each other from time to time; that prior to Laura Rozanski's last illness, which was the first of January, 1939, she was always a neat, industrious person, attended church, travelled around on the street car, helped to do her own cooking, and tended to her own shopping; that witness visited her during the last week of her life, and from the conversation had with her at the time, was of the opinion that testatrix was then of sound mind and memory.

The contestants called Margaret Hammerbocher, who testifeid that she had known testatrix for more than ten years prior to her death, saw her frequently in church, and visited her on January 15, 1938, during her last illness, where she was confined in bed at her son's home; that some conversation ensued between them, but witness could not understand what Mrs. Rozanski was saying; that prior to her last illness, testatrix had always been "nice and healthy but on January 15th she was "shaky", and when she asked for a glass of water and the same was brought to her, her hand was so unsteady that the glass fell to the floor.

[illegible]

testatrix [illegible]

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afflicted; and the [illegible]

necessary to [illegible]

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testified that she [illegible]

to her death, [illegible]

January 3, 1919, [illegible]

bed at her [illegible]

but witness could not [illegible]

unlike to [illegible]

[illegible]

of water [illegible]

that the [illegible]

Mrs. Frederick Hauck, next called as a witness on behalf of the contestants, testified that Alfred Rozanski is her uncle and Mrs. Redlin and Mrs. Gutsky are her mother and aunt respectively; that she saw Laura Rozanski, her grandmother, three times within a period of one year prior to her death, once in Milwaukee and twice in Chicago; that before her last illness testatrix had always been an alert able-bodied woman in spite of her age, which was approximately 80 years, and that she went about shopping with the witness and displayed a keen mentality; that about a week prior to her grandmother's death, Mrs. Redlin had called the witness saying she better come to Chicago to see her grandmother as it would probably be the last time she would see her alive; that the witness drove down the next morning and went into the bedroom where Laura Rozanski was lying in bed, went up to her and took her hand; that she seemed to be in a sclanotic condition, and when the witness bent over to kiss her she observed that her lips were very blue; that the witness spoke to Laura Rozanski, saying, "Hello, Grandma," to which there was no response; that she spoke to her again and thereupon Laura Rozanski moved her lips but made no sound and she heard her say nothing at all during this visit. The witness related a conversation had with her grandmother in August, 1938, wherein the deceased spoke of Mrs. Redlin and her other children, and stated that she felt the same toward all, and that what she had was to be divided equally. On cross examination, witness gave it as her opinion that Laura Rozanski was in a semi-comatose condition when she last saw her, and of unsound mind and memory, her opinion being based upon the appearance of the deceased at the time.

As against the testimony of the several disinterested witnesses produced by the proponents of the will, including those who subscribed as witnesses thereto, there appears only the testimony of Mrs. Hammerbocher, from which no inference of testamentary in-

the

capacity could be drawn, and that of Mrs. Hauck, a daughter of Mrs. Redlin, one of the contestants, who based her opinion upon the physical appearance of testatrix rather than upon the conversations had with her. Furthermore, the record discloses that Mrs. Hammerbocher saw the deceased two days before the will was executed, and Mrs. Hauck visited her four days prior to January 17, 1929. Upon this state of evidence we are of the opinion that the chancellor who heard the evidence did not err in directing a verdict sustaining the will.

It is the settled rule in this state that the question to be determined on a motion to direct a verdict for the proponent in a will contest is whether there is evidence in the record which, with all reasonable inferences taken in the aspect most favorable to the contestant, may be said to be sufficient in law to support the cause of action, and if not, it is the duty of the court to withdraw the issues from the jury, as courts may not speculate as to what might have been the facts in a case, but the burden rests upon the contestant to produce evidence in support of their charges of mental incapacity and undue influence. Greenlees v. Allen, 341 Ill. 268. It has likewise been held that superficial opinions based on casual impressions as the result of incidental conversations or observations are of no value against the positive testimony of disinterested witnesses, tending to show that testatrix had a sound and disposing mind and memory. Laura Rozanski, according to all of the witnesses, had always been an alert, industrious able-bodied person, and remained so in spite of her old age, until very shortly prior to her death. It was her expressed desire that Alfred summon his attorney, Mr. Fleck, to attend to the legal details connected with the preparation and execution of the will. Alfred Rozanski was not in the room when the will was executed, and we find no evidence in the record that would justify the charge of undue influ-

capacity could be drawn, and what [illegible]
Bedlis, one of the contestants, who [illegible]
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Booker saw the deceased two days before the will was executed, [illegible]
Mrs. Hough visited her four days prior [illegible]
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It is the ultimate duty in this [illegible]
to be determined on a motion to direct a verdict [illegible]
a will contest is whether there is evidence [illegible]
with all reasonable inferences [illegible]
to the contestant, may be held [illegible]
the cause of action, [illegible]
withdraw the issues from the jury, [illegible]
to what might have been the [illegible]
upon the contest of a decedent's estate [illegible]
of mental incapacity [illegible] Cline, 241
Ill. 322. It has likewise been [illegible]
based on direct [illegible] or observations [illegible]
disinterested witnesses, [illegible]
and discussing [illegible]
the witnesses, [illegible]
reason, [illegible]
prior to her death, [illegible]
his attorney, Mr. Jones, [illegible]
with the [illegible]
was not in the room [illegible]
evidence in the record [illegible]

ence. The overwhelming weight of evidence is in favor of proponents on the question of testamentary capacity, and under the circumstances, if the chancellor felt that the evidence adduced by contestants, with all its reasonable inferences, taken in the aspect most favorable to the contestants, was insufficient in law to support their cause of action, it was the court's duty to withdraw the issues from the jury.

For the reasons stated, the judgment of the Circuit Court will be affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

34981

M. SALK,

Appellee,

v.

LOUIS BOMASH,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Dec. 2, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment rendered in favor of plaintiff and against defendant for $2,701.33 in a first class contract action filed in the Municipal Court of Chicago.

The statement of claim alleges that plaintiff's claim is upon a written contract between the parties dated January 13, 1925, a copy of which is attached thereto, and which reads as follows:

> "I hereby propose to sell you Ten Shares of the Independence State Bank Stock for the sum of ($2,000.00), Two Thousand Dollars, and in consideration of you becoming a Director of this Bank, I hereby agree to guarantee you the above amount should you at any time hereafter desire to resell the above stock to me plus 6% interest per annum, payable semi-annually.
>
> It is understood that you will leave the above Ten Shares of stock in custody of the Cashier of this Bank, and in case of re-sale you will re-endorse the stock certificate to me."

Plaintiff further alleges that in accordance with the terms of said contract, he bought the said ten shares of the Independence State Bank stock, and paid therefor the sum of $2,000.00; that in accordance with the terms of said contract, plaintiff became a director of said bank, and so remained for a considerable period of time; that in accordance with the terms of said agreement, plaintiff deposited the said ten shares of stock with the cashier of said bank; that on March 22, 1930, plaintiff notified defendant that he desired to resell said stock to defendant in accordance with the terms of said contract, and tendered back the said shares of stock,

Opinion filed Dec. 2, 1931

demanding payment in the amount of $2,630.00, representing the principal sum of $2,000.00 plus interest thereon at the rate of 6% per annum from January 13, 1925, to March 23, 1930; that the defendant disregarded said notice, tender and demand, and refused to pay the aforementioned sum, notwithstanding his obligations and promises so to do under said agreement.

To this statement of claim defendant filed an affidavit of merits, which the court later permitted him to withdraw, and two other affidavits that were subsequently stricken. Finally, defendant filed a second amended affidavit, which averred substantially that (1) the purported contract between the parties is a mere instrument for evading Section 4 of the Banking Act approved June 23, 1919, and therefore, contrary to the public policy of the state of Illinois, and void; that (2) said contract is uncertain, ambiguous and indefinite as to time of performance, price at which stock is to be repurchased and time of payment of purchase price; that (3) defendant offered to purchase said stock from plaintiff at the market price when it was beingtraded in on the market at between $270.00 and $280.00 per share, but plaintiff refused to sell the same; that the purported contract sued upon was in the nature of a guarantee against loss, and that by failing and refusing to sell said stock at the price aforesaid, plaintiff waived his rights under said contract, and the terms and conditions of the purported agreement were fulfilled; that (4) defendant denied that the writing sued upon was binding upon him, but recognizing plaintiff's claim and in order to terminate any liability or claim which might be made against him by plaintiff at the time when the market price of said stock was at and above $270.00 per share, offered to purchase said stock from plaintiff at the then market price thereof, and advised plaintiff if he did not elect to sell said stock he would continue to hold the same at his own risk, notwithstanding which, plaintiff still refused to sell said

stock but undertook and agreed to hold the same without reference to said guarantee and at his own risk; that (5) defendant admits the purchase of said stock by plaintiff for the sum of $2,000.00, but denies that plaintiff accepted the offer of the defendant as set forth in the written agreement herein, and that defendant's offer to repurchase therefore elapsed; (6) that plaintiff deposited said stock with the cashier of said bank in accordance with the statutes of the State of Illinois and qualified as a director of said bank, and is still acting in that capacity; that as such director plaintiff accepted fees for attendance at directors' meetings, and as a stockholder accepted regular and special dividends on said stock, and that so long as plaintiff remains a director in said bank, he has no control or possession of such stock and cannot tender the same to the defendant or dispose thereof.

The second amended affidavit of merits being stricken by the court, defendant elected to stand thereby. The court thereupon entered default against the defendant for want of an affidavit of merits, and rendered judgment for the plaintiff upon his affidavit of claim in the aforementioned sum.

Notwithstanding the several defenses interposed by defendant's second amended affidavit of merits, two principal grounds are urged for reversal of the judgment. It is first contended that the provisions of paragraph 4, of the Banking Act (Cahill's Illinois Revised Statutes of 1929, Chapter 16a) indicates that it is the public policy of the state that a director of a bank shall have a pecuniary interest in the stock required by the act to be owned by him, and that such interest shall be a real interest and not a mere record title or a title held under a contract guaranteeing him against losses by reason of the ownership of the stock. In this connection, counsel argue that the written proposal was a mere device designed for the purpose of evading the intent of the

legislature and the express language of the statute which provides that a director must "hold in his own right" and be "owner in good faith" of the stock acquired by him.

We see no merit in this contention, however. The obvious and unmistakable object and purpose of Section 4 is to provide that a director own the required number of shares in his own name, and that the stock should not be pledged, mortgaged, hypothecated or otherwise given as security for any loan or debt, which in the event of a default in the payment of the debt, might result in divesting the direction of his ownership of the stock. The written proposal in the instant case which became a contract when acted upon by plaintiff, and resulted in the sale of the stock to him, contained an option to resell the same to defendant, and did not in any manner make the plaintiff any the less the owner in good faith and in his own right of this stock. In fact, plaintiff had to be the owner of the stock in order to be in a position to resell the same to defendant. He had admittedly paid $2,000.00 therefor, and had satisfied the requirements of the statute by depositing the stock with the cashier of the bank unendorsed and unencumbered, and the mere fact that the written proposal contained a guarantee to plaintiff of the amount of the purchase price with interest thereon at any time that he should desire to resell the same to defendant, does not lend force to the contention that the option feature of the proposal constituted a device intended to defeat the purpose of the statute so as to render the agreement invalid as contravening the public policy of the st te.

Defendant, by his brief, states that there seems to be no direct authority for his contention, but cites a number of decisions, which upon examination, appear to be inapplicable to the facts of this case. Chemical National Bank v. Colwell, 30 N. E. 644, merely holds that a director is not liable as a stockholder because he had previously assigned his stock, although the stock was not assigned

on the books of the corporation. Tough Oakes Gold Mines Limited v. Foster, 39 Ontario, L. R. 144, was an action by a corporation and several individuals to restrain the defendants from acting as directors. The real question presented was whether a certain meeting to stockholders at which plaintiffs were elected directors, was valid. The by-laws of the corporation provided that each director should be the holder absolutely in his own right of at least one share of capital stock of the company, and that to constitute a quorum, there must be present shareholders representing at least one third of the shares of the company. The decision is merely authority for the proposition that the books of the corporation are conclusive as to who are the stockholders. Another case cited by defendant, Bainbridge v. Smith, 41 Ch. D. 462, involved a question of fact, tried by the court, as to whether the stock in question was in fact transferred to the director or not, and raised the question whether a director had a right to act.

The written proposal in the instant case was drawn by the defendant. It seems to be perfectly plain in its terms, requiring no construction, and if there could be any doubt as to its legality, we should be obliged to adopt that interpretation which renders the contract operative and legal rather than inoperative and illegal. Minnesota Lumber Co. v. Coal Co. 180 Ill. 85, Pennsylvania Retreading Tire Co. v. Goldberg, 324 Ill. App. 241.

It is next urged that the contract is indefinite and uncertain in that it fails to specify the time of resale, the manner of computing the purchase price and the amount of interest to be paid by defendant in the event of resale. In this connection, plaintiff calls attention to the fact that the defendant made a motion in the court below to strike plaintiff's statement of claim, which was argued and considered by the court and overruled; that defendant did not elect to abide by his motion but elected to plead to the merits,

and that the question of the sufficiency of plaintiff's statement of claim, including the proposition now urged, was thus waived by defendant. This is undoubtedly the rule as established by numerous decisions in this state. Barnes v. Brookman, 107 Ill. 317, C. & A. Ry. Co. v. Bell, 209, Ill. 35. Moreover, we fail to find the proposal subject to the objections urged. The proposal is a very simple document by which defendant guaranteed plaintiff $2,000.00 for his stock "at any time hereafter" that plaintiff should desire to resell same "plus 6% interest per annum, payable semi-annually". We are unable to find any ambiguity in this language. Defendant argues that the interest charges are indefinite, in that the proposal does not state whether simple or compound interest is to be charged. This appears to us as raising a question of construction not warranted by the language employed. Furthermore, plaintiff claims only the simple interest and the court allowed nothing else. We believe that all of the elements of the contract are perfectly definite and certain,

Finding no reversible error, the judgment of the Municipal Court should be and the same is accordingly affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

34990

PEARL SIMON,

(Plaintiff) Appellee,

v.

CITY OF CHICAGO, a Municipal Corporation, and YELLOW CAB COMPANY, a Corporation, and YELLOW COACH MANUFACTURING COMPANY, a Corporation,

(Defendants) Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

263 I.A. 656

Opinion filed Dec. 2, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

This is an action on the case brought by Pearl Simon, as plaintiff, against the City of Chicago, Yellow Cab Company and Yellow Coach Manufacturing Company, as defendants, for injuries alleged to have been sustained by her while riding in a Yellow Cab in the City of Chicago on March 18, 1929. The case was tried before the court and a jury resulting in a verdict and judgment for $2,000. At the close of plaintiff's evidence the action was dismissed as to the Yellow Cab Company and the Yellow Coach Manufacturing Company.

The essential facts disclose that plaintiff was riding with her husband in a Yellow Cab on the night of the accident; that while going around the northeast corner of the intersection of Roosevelt Road and Homan Avenue, the wheels of the cab struck a hole in the pavement, which according to the evidence had been in existence several months prior thereto, throwing plaintiff from the seat to the floor of the cab and causing the injuries complained of.

As grounds for reversal, it is first urged on behalf of the City of Chicago, appellant, that the statutory notice served upon the city was insufficient in that it failed to describe the exact location of the hole in the pavement, and therefore did not apprize the city of the cause and the place of the accident. The abstract of the bill of exceptions does not contain a copy of the

notice. However, a copy of the [illegible] is attached to [illegible] declaration and states as follows:

> "On and prior to [illegible], [illegible] Henry Hinson was injured on the [illegible] at 1:00, at the hour of about 1:30 [illegible], while riding in a bicycle belonging to [illegible] Company, a [illegible] and [illegible] accident to the [illegible] certain [illegible] thereby [illegible] injuries [illegible].
>
> "We are taking [illegible] of the injuries [illegible] 2505 [illegible] Boswell and [illegible] Hinson [illegible] in question the [illegible] medical care [illegible] Hinson [illegible]."

Under the statutory [illegible] notice, [illegible] notice as sufficient. In the case of Young v. City of Tacoma, 205 III. 510, the court considered the question of the sufficiency of a notice locating the place of the injury as "on near the corner of 25th Street and Jefferson Avenue," and held the notice to be in compliance with the statute. The court stated in its opinion that the requirements of the notice should receive a liberal construction, its purpose being to enable the officers of the city to locate the place of the injury with a view of repairing a nuisance, if it was thought defense should be made, and that if the notice directed the attention of the officers with reasonable certainty to the place of the accident, the requirements of the statute were met. In the course of its opinion, the court stated:

> "It was not intended that the terms of the notice should be used as a stumbling block or pitfall to prevent recovery by technicalities alone."

From this and other cases cited by plaintiff, we conclude that the notice served upon the City of Spokane met the requirements of the statute.

The only other grounds used for moving a nonsuit are the sufficiency of plaintiff's evidence, and as to the extent of the injuries. With reference to the first of these contentions, it should be noted that the city [illegible] motion. Upon a careful examination of the record, it appears [illegible]

evidence fully sustains the verdict.

As to the extent of the injuries, it appears that after the accident plaintiff was taken to her home by the driver of the cab; that a doctor was called at 2:30 a. m. on the morning of the accident, who made an examination of plaintiff; that he found bruises on her back, evidence of exudation of blood under the skin in the region of the back and considerable tenderness in the back; that a subsequent examination of plaintiff's urine disclosed blood contents which continued for about a month, and later recurred. Plaintiff was confined to her bed for more than six weeks, during which period the doctor in attendance made more than twenty calls, and received heat treatments and warm applications at the doctor's direction. Thereafter plaintiff received numerous additional treatments. The doctor in attendance testified that the location of the tenderness in plaintiff's back, as well as the presence of blood in her urine, indicated bleeding of the kidneys, called hematuria, which might be caused by external violence. Another physician who took X-rays of the injured parts of plaintiff's body testified that the pictures indicated some thickening around the inter-vertebral space between the third and fourth lumbar vertebrae, and between the fourth and fifth lumbar vertebrae, as well as the displacement of the coccyx. All of these facts were presented for the jury's consideration, and in the absence of any countervailing proof on the part of the city, we are not disposed to disturb the verdict as being excessive.

No objections are made as to the giving or refusal of any instructions, and there being no other error complained of, we are of the opinion that the judgment of the Circuit Court should be and it is accordingly affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

35367

CARL ULLRICH,

(Complainant) Appellee,

v.

CHARLES LUDWIG, et al,

(Defendants) Appellants.

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT

COOK COUNTY.

263 I A 356

Opinion filed Dec. 2, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

On June 18, 1931, complainant filed his bill of complaint, seeking to foreclose the lien of the trust deed described therein, and for the appointment of a receiver pendente lite. The bill alleges a default in the payment of interest amounting to $750.00 and of the entire principal sum aggregating $28,000; that the real estate in question is improved with an apartment building containing six apartments; that said property is scant and meager security for the mortgage; that waste is being committed and that in the event of a foreclosure sale there will be a deficiency.

Upon application of the complainant, the chancellor on June 29, 1931, before answer filed, appointed Aetna State Bank as receiver, over the objection of defendants. The order required that complainant file his bond within ten days. On June 30th defendants moved to vacate said order, and the court continued the motion to July 31, 1931.

Thereafter, on July 24, 1931, complainant filed an amendment to the bill of complaint, alleging further that the property was sold for 1927 general taxes amounting to $155.34, and that the taxes for the years 1928 and 1929 remained unpaid. Complainant filed no bond as required by the order of June 29th, but appeared before another chancellor on July 24, 1931, and renewed

Opinion filed Dec. 2, 1931

the motion for the appointment of a receiver under the amended bill of complaint. This motion was continued to July 27, 1931, when the chancellor vacated and set aside the order theretofore entered for the appointment of Aetna State Bank as receiver and appointed Union Bank of Chicago as receiver nunc pro tunc as of June 29, 1931, and further ordered that said receiver be entitled to all rents accruing from and after June 29, 1931, and that complainant file his bond, without specifying a time limit therefore. This appeal is prosecuted to set aside the interlocutory order entered on July 27, 1931, for the appointment of Union Bank of Chicago as receiver.

The principal question presented for review is whether the allegations of the amended bill of complaint are sufficient to support the order appointing a receiver. It is true, as pointed out by defendants' brief, and as held by us in the recent case of Frank v. Siegel, Opinion No. 35361, that mere default in the payment of the mortgage indebtedness will not justify the appointment of a receiver, even though the trust deed pledges the rents, issues and profits as security for the indebtedness, where no showing is made with reference to the security for the mortgage debt or any other necessity for the appointment. The gist of the opinion in the Frank case is that the court is not bound to enforce a provision in the trust deed providing for the appointment of a receiver where it is not necessary to enforce the lien on the rents and profits for the payment of the indebtedness. However, such an agreement as stated in the Frank case, and in most of the decisions therein cited, is entitled to weight in determining whether the power of the court to make the appointment should be exercised or not. In the instant case the amended bill of complaint alleges not only substantial defaults in the payment of interest and principal, but also shows affirmatively that defendants permitted the property to

be sold for taxes in 1927, and failed to pay the taxes for 1928 and 1929. These facts indicate that unless redemption is made from said tax sale, a deed will issue. In addition to the sale for taxes in 1927, defendant failed to pay taxes for the two subsequent years, showing not only a continuous default under the trust deed for a period of three years, but such neglect of the property as tends to impair the security of complainant's lien. Under the decisions dealing with the questions of the appointment of receivers the courts have uniformly held that the appointment should be based upon a consideration of all of the equities of the case. Chicago Title & Trust Co., v. McDowell, 257 Ill. App. 492; Rothman v. Lindstrom, 221 Ill. App. 262. In the light of the circumstances shown by complainant's amended bill, we do not regard the appointment herein as improvidently made.

It is next urged that the order is erroneous in not fixing the time within which the complainant should file the bond required by said order. The record discloses that defendant appealed from the order appointing a receiver on the same day that the order was entered. Within two or three days thereafter complainant filed his bond. This, it seems to us, eliminates the objection urged by defendants, and distinguishes, the instant case from Citizens Trust v. Blair, 256 Ill. App. 605, relied upon by defendants. In the latter case no bond was filed, and we held that the time within which complainant should be required to file his bond must be fixed by the order. The obvious purpose of that requirement is that it should not be left for complainant's determination when the receivership is to become effective, and thus deprive defendant of his right to an interlocutory appeal, which must be taken within the limited time fixed by the statute.

It is next urged that the order is erroneous in that it was entered nunc pro tunc as of June 29, 1931. In support of

[illegible]

this contention it is urged that the owner of the equity or redemption is entitled to the rents until a receiver is legally appointed and has qualified to act. We find in this record, however, an order entered on motion of the defendants which provides for a continuance of the motion to vacate and set aside the order entered June 29, 1931, stipulating that during the period from the last mentioned date until the disposition of the motion, all rents from the premises in question shall be deposited with the Aetna State Bank, theretofore appointed receiver, and subject to the further order of the court. This indicated a willingness on the part of defendants to have the right of defendants to the rents, issues and profits held in abeyance until they might establish the defense to the bill of complaint intended to be filed by them, showing them to be rightfully entitled to the rents. Presumably, the court continued the motion only upon the condition stated in the order. The failure of defendants to file an answer denying any of the allegations of the bill as amended, and their failure to make any effort to be heard upon the question of rents, justifies the assumption that under the order entered on defendants' motion it was intended that the receivership, if established, should become effective as of the date when the motion was first made by complainant. This seems to have been the tacit agreement of the parties with the court, and defendants should not now be heard to complain thereof.

The failure of complainant to make certain tenants in possession of the property parties defendant, is urged as an additional ground for reversal. This question is raised for the first time on appeal. As a general rule, a tenant in possession is a necessary party to a bill praying the foreclosure of a trust deed, and should be brought into the proceeding in order to make the decree effective against all parties in interest. The question of necessary parties should, however, be raised by proper pleadings filed in the trial court,

and not raised for the first time on appeal to this court. Defendant will have ample time and opportunity to raise this question before hearing of the cause by the chancellor. There is no merit in the contention made as applicable to this interlocutory appeal.

Lastly, it is urged that the order appointing the receiver is too broad in its terms. Counsel argues that under the language employed the receiver could make leases extending beyond the period of redemption. The order authorizes the receiver "to lease the same (the premises) and to collect the rents, issues and profits thereof." We find nothing in the language thus employed to justify defendants' contention. It is the duty of the receiver to obtain the court's sanction in all matters of importance pertaining to the administration of the estate, and we will not assume in advance that the receiver in the instant case will depart from the prescribed practice in this respect.

We are of the opinion that the order appointing a receiver was properly made, and the same will therefore be affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

35639

OSCAR H. HAUGAN, as Trustee,
(Complainant) Appellee,
v.
CARL THORGENSEN, et al.,
(Defendants) Appellants
On Appeal of BERNARD GIVEN,
Appellant.

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT

COOK COUNTY.

263 I.A. 656

Opinion filed Dec. 2, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

By this interlocutory appeal Bernard Given, owner of the equity of redemption and of the legal title to the premises involved, presents for review an order appointing the Chicago Title & Trust Company receiver of premises described in the bill of complaint filed herein, seeking the foreclosure of a first mortgage trust deed.

The bill of complaint, filed on August 28, 1931, and verified by one of the solicitors for complainant, alleges in substance that on January 15, 1925, Carl Thorgensen and Hans Kricksen executed and delivered 340 bonds bearing even date therewith, aggregating $365,000.00 secured by trust deed conveying certain premises in Chicago, Illinois, together with the improvements thereon as security for their indebtedness. The trust deed pledges the rents, issues and profits from the premises as security for the indebtedness, and provides that upon the filing of any bill for the purpose of foreclosing said trust deed, complainant shall be entitled as of right to the appointment of a receiver of the mortgaged property.

It further appears from the bill of complaint that substantially $65,000.00 of the total indebtedness has been paid, but that on July 15, 1931 interest amounting to $6,000.00 and principal

Opinion filed Dec. 2, 1981

in the sum of $6,500.00 became due and payable, but the same were not paid and that default occurred and has continued for more than 30 days; that general taxes for 1928 amounted to $4,684.40, of which $2,337.20 has been paid on account, objections having been filed as to the balance, and the taxes for 1929 remain unpaid; that said premises are improved with a three story brick English basement store and apartment building, containing 80 apartments and 7 stores; that the building was completed in 1924; that "said premises are badly in need of repairs and redecorating;" that "there are vacancies in said premises;" that "it will be necessary to repair and redecorate and improve said premises in order to obtain suitable tenants for the portion thereof which is vacant, and in order to keep the tenants now occupying said premises;" that "by reason of the condition of the real estate market in the City of Chicago at the present time, the value of said premises has greatly diminished; that said premises are scant and insufficient security for the indebtedness secured by the trust deed sought to be foreclosed herein; that in the opinion of your orator sale of said premises under a foreclosure decree would not realize a sufficient amount to pay in the full the indebtedness secured by the trust deed sought to be foreclosed herein, together with the necessary costs, expenses, reasonable solicitors' fees and charges incurred by your orator in the prosecution of this suit, and in the preparation thereof." Following these allegations, the bill prays among other things for the appointment of a receiver to take possession of the premises and collect the rents, issues and profits thereof.

As grounds for reversal, it is urged that the apointment was improvidently made, principally because the allegations of the bill of complaint were insufficient to warrant the appointment of a receiver.

The bill of complaint upon which this appointment is

predicated is in most respects similar to that filed in the case of Hannah Frank v. Max Siegel, Appellate Court for First District of Illinois, Opinion No. 35361, wherein it was held that a court of equity will not specifically enforce the provisions of a trust deed for the appointment of a receiver upon default unless equitable considerations so require; that the request for a receiver is an appeal to the conscience of the court, and not a demand based upon any agreement of the parties purporting to restrict the discretion of the chancellor; that the possession of the receiver is the possession of the court, and parties cannot by contract impose this burden of administration upon the chancellor regardless of the necessities of the situation; that the burden of showing to the court the facts which would justify the appointment of a receiver is upon the complainant. Whatever diversity of opinion may have existed between the various divisions of this court prior to the decision in Frank v. Siegel, supra, was harmonized by that decision and the concurrence therein by the members of this court.

Aside from the allegations in the bill, showing defaults in the payment of principal and interest, the only other circumstances presenting matters for the court's consideration relate to the nonpayment of taxes. As to the taxes for 1938 it appears that a portion thereof was paid and objections thereto filed as to the balance. When the bill of complaint herein was filed, there was still time for objecting to the taxes for 1939.

The various other matters alleged in the bill of complaint must be regarded as mere conclusions. It appears from the bill that the property is improved with a building containing 80 apartments and 7 stores, completed as recently as 1934. The allegation that the premises are badly in need of repairs and redecorating furnishes no facts from which the court can conclude that waste is being committed. The averment that there are vacancies in the premises, without stating the number or extent thereof,

predicated in no such remote sense [illegible] taken an [illegible] through trust v. [illegible]. [illegible] Illinois, [illegible] equity will not specifically enforce the [illegible] for the acquisition of a relative much [illegible] evidentiary so [illegible] to the consciousness of the court. [illegible] ment of the matter [illegible] observation; that the [illegible] the court, and [illegible] administration upon the [illegible] the situation; [illegible] would justify the [illegible] whatever diversity of opinion may have existed [illegible] divisions of this court [illegible] in the decision in [illegible] supra, was harmonized by the decision [illegible] by the members of this court.

[illegible] arise from the [illegible] fault in the [illegible] conscience [illegible] to the [illegible] that a portion thereof [illegible] the [illegible] was still time for [illegible] by the [illegible].

[illegible] plaint must be regarded [illegible] bill that the [illegible] quarrels and [illegible] allegation that the [illegible] [illegible] that [illegible] being [illegible]

is too vague and uncertain to be of any evidenciary value. The general allegation that it will be necessary to repair and redecorate said premises in order to obtain suitable tenants for the vacant portion thereof is based partly on the assumption that there are many vacancies, which does not appear from the bill. As to the averment that repairs and decorations will be necessary in order to keep the tenants now occupying said premises, no showing is made that any of the present tenants are threatening to move if repairs and decorations are not furnished. That portion of the bill which alleges that the property is scant and insufficient security for the indebtedness is likewise a conclusion, and the averment that the premises will not realize a sufficient amount under a foreclosure sale to pay the full indebtedness, can be regarded as nothing more than an opinion or predication. While it may be true that the property has depreciated in value, the facts disclose that $65,000 has been prepaid on the indebtedness, thus equalizing the proportion of the remainder due to the value of the security. Presumably, the complainant could have made a showing as to the present value of the property so as to enable the court to determine whether it would be necessary to sequester the rents for complainant's protection pendente lite, and it was complainant's burden to make this showing.

As further ground for reversal, it is urged that the bill fails to allege either the insolvency of the mortgagor or of the owner of the equity of redemption, and that the order of appointment is too broad, in that it authorizes the payment of taxes by the receiver, notwithstanding the objections filed as to a portion thereof by the appellant. In view of our conclusion as to the insufficiency of the bill, however, for the reasons stated, it will be unnecessary to discuss the latter contentions.

We are of the opinion that the appointment was improvidently made and the order of the Circuit Court will therefore be reversed.

REVERSED.

HEBEL, P.J. AND WILSON, J. CONCUR.

is too vague and uncertain to be of any evidentiary value. The general allegation that it will be necessary to resort to accounts held jointly in order to obtain evidence bearing on the amount of portion thereof in a suit brought by the defendant that there are many vouchers, which does not appear from the bill. In the previous that results and descriptions will be necessary in order to show the tenants now occupying said premises, so showing to whom or the present owners are therefore being to note if in view of the claims are not furnished. That portion of the bill which alleges that the property is worth one hundred eighty thousand dollars is indefinite in likewise a conclusion. And the averment that the vouchers will not realize a sufficient amount under a foreclosure sale to pay the indebtedness, can be regarded as a mere conclusion or prediction. While it may be true that a foreclosure has depreciated in value, the facts alleged in the bill do not show the indebtedness, thus modifying the application of the consideration of the value of the security. Consequently, the bill must fail unless made a showing as to the present value of the property so as to enable the court to determine whether it would be proper to a decree the rule for complainant's foreclosure under the mortgage bill, and in the complainant's answer to case this is wise.

As further ground for reversal, it is urged that the bill fails to allege either the insolvency of the mortgagor or the owner of the equity of redemption, and that the bill of complaint is too broad, in that it authorizes the appointment of a receiver, notwithstanding the objections filed on the ground of the receiver by the mortgagor. In view of our conclusion as to the local nature of the bill, however, for the reasons stated, it will be unnecessary to discuss the latter contentions.

The ruling of the court in [illegible] the motion to identify made out the order of the district court will therefore be

35008

W. P. COONEY and T. S. KORSHAK, doing business as COONEY & KORSHAK,

(Plaintiffs below) Defendants in Error,

v.

MISSOURI, KANSAS, TEXAS RAILROAD COMPANY OF TEXAS, a Corporation, THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, a Corporation, and WILLIAM SHERMAN HAY and MEYER MORTON,

Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT,

OF CHICAGO.

269 I.A. 657

Opinion filed Dec. 2, 1931

MR. JUSTICE WILSON delivered the opinion of the court.

March 23, 1928, plaintiffs, W. P. Cooney and T. S. Korshak, doing business as Cooney & Korshak, brought their action in the Municipal Court of Chicago against the defendant, Missouri, Kansas, Texas Railroad Company of Texas, for damages sustained in connection with a shipment of spinach by the defendant carrier company.

April 12, 1928, a motion to quash the service was allowed, the defendant having entered its special appearance for the purpose of the motion.

October 3, 1929, the suit was dismissed for want of prosecution and judgment for costs rendered in favor of the defendant.

June 9, 1930, on motion of plaintiffs, without notice, an order was entered setting aside the judgment and reinstating the cause.

June 23, 1930, plaintiffs filed an amended statement of claim in which the New York, New Haven & Hartford Railroad Company was made a party defendant and, at the same time, an affidavit for attachment in aid was filed and the writ issued against the defendants,

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Hay and Morton, as garnishees.

July 17, 1930, an order was entered overruling the motion of William Hay and Meyer Morton, associated as Hay & Brown, to quash the writ of attachment in aid.

July 31, 1930, Hay and Morton filed a motion to vacate the order of June 9, 1930, which was the order reinstating the cause.

August 13, 1930, the motion to set aside the order of June 9, 1930 was overruled.

The order of June 9, 1930, vacating the judgment order of dismissal of October 3, 1929, was entered eight months after the original judgment order dismissing the suit for want of prosecution.

The complete order of June 9, 1930, as it appears in the record, follows:

> "On motion of the plaintiff herein, it is ordered that the order dismissing this cause entered herein be and the same is hereby vacated and set aside and for naught esteemed and that this cause be and it hereby is reinstated in this Court."

The record before us is certified to as a true, perfect and complete transcript of the record in the cause. No written motion, petition or pleading of any kind appears to have been made upon which the order of June 9th was predicated. The defendants who bring this writ of error insist that the court was without jurisdiction to set aside the judgment order of October 3, 1929, dismissing the suit for want of prosecution, because of the fact that over 30 days had elapsed and that the judgment order could be vacated only in accordance with the provision of Chap. 37, par. 505, sec. 30½ of the Municipal Court Code, Cahill's Illinois Revised Statutes of 1931, which provides, as follows:

> "505. NO STATED TERM OF COURT - MOTIONS TO VACATE OR MODIFY JUDGMENTS, ORDERS AND DECREES - TIME FOR MAKING - ERROR CORAM NOBIS.) § 30½. There shall be no stated terms of the Municipal Court, but said court shall always be open for

the transaction of business. Every judgment, order or decree of said court final in its nature shall be subject to be vacated, set aside or modified in the same manner and to the same extent as a judgment, order or decree of a Circuit Court during the term at which the same was rendered in such Circuit Court; provided, a motion to vacate, set aside or modify the same be entered in said Municipal Court within thirty days after the entry of such judgment, order or decree. If no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order ordecree, the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by a bill in equity, or by a petition to said Municipal Court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity; provided, however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by the writ of error coram nobis may be corrected by motion, or the judgment may be set aside, in the manner provided by law for similar cases in the Circuit Court."

An examination of the record shows that there was no written motion to vacate the judgment order dismissing the suit for want of prosecution, setting forth the grounds for vacating the same, nor was there any notice served upon the defendants or any of them. Counsel for the plaintiffs insists that the summons which issued out of the court against the defendant Missouri, Kansas, Texas Railroad Co., having been quashed on motion, there was no defendant in the cause upon whom notice could be served. With this we cannot agree. Even though the defendant had been dismissed on the service in the proceeding, nevertheless, the Missouri, Kansas, Texas Railroad Company of Texas was still a defendant. There could be no action without a plaintiff and a defendant, and we are not impressed with the argument. Moreover, the record which purports to be a complete record, fails to show any written motion, petition or pleading conforming to the provision of the Municipal Court Act with regard to the reinstating of causes dismissed for want of prosecution after the lapse of the 30 day period, provided by said act.

The court was without jurisdiction to reinstate the cause after the lapse of the 30 days, except in conformity with the

section of the Municipal Court Act already referred to. There was no attempt on the part of the plaintiff to do any of the things required by this section of the Municipal Court Act and, consequently, the court had nothing before it upon which it could base the order of June 9th reinstating the cause of action. It necessarily follows that all the proceedings after the order of June 9th were void because of the fact that the original order of June 9th itself was entered by the court without the compliance by the plaintiff with the requirements of section 20½ of the Municipal Court Act. The court had no jurisdiction, therefore, to vacate the judgment order of October 3, 1929, dismissing the suit for want of prosecution and entering judgment for costs. Sherman & Ellis, Inc. v. Journal of Commerce, 259 Ill. App. 453; Central Bond Co. v. Roeser, 323 Ill. 90. So far as the record shows, the original suit was dismissed when reached in its regular order on the trial call. The plaintiff had the right to consider the judgment order as an involuntary non suit and start a new suit within a year.

For the reasons stated in this opinion the order of June 9, 1930, setting aside the order of October 3, 1929, which was the order dismissing the suit for want of prosecution, is reversed and the cause is remanded with directions to dismiss the attachment in aid and to take such steps as are necessary in conformity with this opinion herein expressed.

The judgment is reversed and the cause remanded with directions.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

HEBEL, P.J. AND FRIEND, J. CONCUR.

35070

THE FIRST NATIONAL BANK OF PALATINE, a Corporation, Appellant, v. HAHNEMANN INSTITUTIONS OF CHICAGO, Inc. Appellee.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

263 I.A. 657

Opinion filed Dec. 2, 1931

MR. JUSTICE WILSON delivered the opinion of the court.

This is an action on a judgment note signed by the defendant Hahnemann Institutions of Chicago, Inc., a corporation, by J. H. Renner, its president. Judgment was entered by confession August 11, 1930, in favor of the plaintiff, First National Bank of Palatine. Subsequently the defendant entered its appearance and was given leave to defend with the said judgment to stand as security. The cause again came on for trial on November 12th, and after a hearing an order was entered November 21, 1930, confirming the original judgment. December 15, 1930, new counsel appeared in the case for the defendant and the judgment was again vacated and the cause again tried, - this time (January 12, 1930) before the court without a jury. The court found the issues in favor of the defendant and entered judgment against the plaintiff, from which judgment this appeal was prayed and allowed.

From the facts it appears that on July 5, 1928, a certain note was executed for the sum of $2,000, payable to the plaintiff, signed by Hahnemann Institutions of Chicago, Inc., by J. H. Renner, its president. The consideration for this note was a cashier's check for $2,000, payable to Hahnemann Institute of Chicago. This note was taken up and cancelled by the giving of

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another note for the same amount and signed in the same manner. This second note in turn was taken up and a new note given, signed by the defendant corporation, by J. H. Renner, its president, and it is this note upon which the action is predicated.

Defendant's position appears to be that the note was, in fact, Renner's individual note and not the note of the corporation. Evidence was introduced for the purpose of showing that at the time the original note was signed it was signed by J. H. Renner and not by the corporation and that the loan does not appear upon the books of the defendant as a loan to the corporation.

From the evidence of Renner, the president, who was produced as a witness for the defendant, it appears that he negotiated the loan and the note was sent to his office and that he signed it individually, but that the bank returned it to him for the purpose of having him sign it as president of the corporation so as to constitute the defendant the maker of the note. He testified that he did this and returned the note to the bank. Thereupon, they issued their cashier's check, payable to the defendant corporation. This check was given to the treasurer of the defendant and cashed by him as treasurer of the company, and the money turned over to the defendant and used by it in its business.

The record is full of testimony as to conversations between the different officials of the defendant corporation, but these conversations were not in the presence of the plaintiff or any of its officials, and in our opinion, in most instances incompetent for any purpose. There is no charge that the bank acted fraudulently in the transaction. If the bank did not care to take the note of Renner, it was its privilege to refuse. When the note was signed by Renner, as president of the defendant corporation, the bank issued its cashier's check payable to the maker of the note,

which was the defendant.

A corporation has the right to borrow money and the president of such corporation has implied authority to execute notes for that purpose. The defendant knew that the money had been borrowed for corporate purposes as shown by the treasurer's report of July 26, 1928. From this report, which was submitted to the board of directors, it appears that the defendant received the cashier's check in question and it was carried in the report as a loan. The defendant having received the money which was the consideration of the note is estopped to deny the authority of the president to make and execute said note. Sargent v. McDonough & Co., 197 Ill. App. 523; Alton Manf. Co. v. Biblical Institute, 243 Ill. 298.

There is no force in the argument that Renner, individually, is attempting to collect this amount from the defendant on the ground that it was his own loan to the company. The plaintiff has no concern with any other proceedings between the defendant and its president. A note signed by a corporation, by its president, where the money is paid directly to the corporation and used by it, should not be lightly set aside. The plaintiff had the right to refuse to accept the note of Renner and demand a corporate note in the event it loaned the corporation the money, as was done in this case.

The trial court appears to have been of the opinion that there was no consideration for the note. We are at a loss to understand this position in view of the fact that defendant received the money and used it for corporate purposes. The note was the note of the corporation, executed by its president, and the defendant having received the money and used it, it is estopped to deny the authority of the president to execute it.

It would serve no useful purpose to reverse this cause for a new trial, and for that reason and the reasons stated in this opinion, the judgment of the Municipal Court is reversed and judgment is entered here in favor of the plaintiff with a finding of fact. Judgment here for $2,550.39, which includes attorney's fees and interest to date. JUDGMENT REVERSED AND JUDGMENT HERE WITH A FINDING OF FACT.

HEBEL, P.J. AND FRIEND, J. CONCUR.

FINDING OF FACT:

We find as a fact that the note sued upon was the note of the defendant corporation and that said defendant received and used the money and is, therefore, estopped to deny that it is the note of the corporation.

35079

BERNARD McKIERNAN,

Appellant,

v.

TAYLOR & LYNCH CARTAGE CO.,
a Corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

263 I.A. 657

Opinion filed Dec. 2, 1931

MR. JUSTICE WILSON delivered the opinion of the court.

The plaintiff Bernard McKiernan secured a judgment by default against the defendant Taylor & Lynch Cartage Co., a corporation, for $15,000 at the December term of the Superior Court, 1930, in an action for trespass on the case for personal injuries. The defendant at the following term filed its motion in writing under section 89 of the Practice Act, seeking to have the judgment vacated and set aside with leave to plead. To this motion defendant filed its general and special demurrer which was overruled, the judgment vacated, the cause reinstated, and the defendant given leave to plead. From this order plaintiff prayed his appeal to this court, assigning as error; 1st, that the court had no jurisdiction after the judgment term to set aside the judgment; 2nd, that the written motion filed by the defendant did not set up facts which would authorize the court to vacate the judgment; and 3rd, that the defendant was guilty of negligence and not entitled to relief.

The written motion in question charges, among other things, that on October 3, 1930, two days after the institution of plaintiff's suit and within two weeks after the accident on which plaintiff's suit was based, a stipulation was entered into between the plaintiff and the defendant for an examination of plaintiff by a physician. Under this stipulation the physician was not afterward to be called as a witness upon the trial of the case. The stipulation

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was entered into on behalf of the plaintiff, by his attorney Gold, and on behalf of the defendant by one Johnson, who was not an attorney, but was an investigator and adjuster acting on behalf of the defendant; charges that this stipulation was entered into as the result of earlier conferences between Gold and Johnson for the purpose of effecting a settlement without litigation; charges there were numerous conferences between these two during the months of October and November, for the purpose of arriving at a settlement of the claim and that the highest sum asked by the attorney for the plaintiff in settlement of the claim was $3,500; charges that Johnson told plaintiff's attorney that he could not make any settlement until he had an opportunity to see and talk with the plaintiff and that on or about November 15, 1930, plaintiff's attorney arranged for an interview between Johnson and plaintiff and this interview was had on November 21, 1930; charges that a default had been taken in the case against the defendant on November 12, 1930, which was three days prior to the time arranged by plaintiff's attorney for the interview between Johnson and the plaintiff; charges that on November 25, 1930, Johnson talked with the attorney for the plaintiff and asked for a detailed statement of the medical and hospital expenses and was informed that the attorney for the plaintiff had not as yet received these bills, but would obtain them for Johnson; charges that on December 1, 1930, the judgment was proven up and that Johnson made frequent efforts to reach plaintiff's attorney on the 'phone during the month of December, but was invaribly told after having given his name to the operator, that the plaintiff's attorney was not in; charges that on December 1, 1930, when the case was called for hearing and the jury impaneled to assess plaintiff's damages, the attorney for the plaintiff called the attention of the court to the fact that

the case had been called on two or three occasions and that the defendant had been notified several times, but did not seem to care to defend; charges that neither the defendant nor Johnson was informed at any time of the default taken nor of the proving up of the judgment and that the plaintiff's attorney waited until after the December term had gone by and then, for the first time, informed the defendant of the default and judgment.

The written motion contains certain allegations that the defendant has a meritorious defense to the cause of action, setting up the facts in full and charging that judgment was obtained by a deliberate course of deception on the part of the attorney for the plaintiff and by concealing from the defendant's representative, with whom he was negotiating, facts which lulled the defendant and its representative into a sense of security; charging further that plaintiff's counsel had misled the trial court by informing that court that the case had been called on two or three occasions and the defendant notified, but that the defendant did not appear interested in the litigation.

It appears further from the written motion that the summons had, in fact, been turned over to one Eleanor Brown, a stenographer for the firm of Green & Rice, the attorneys for the defendant, and that accompanying this summons was the stipulation entered into between Johnson and the plaintiff's attorney and that she, Eleanor Brown, presumed that, because of the stipulation, some other attorney was taking care of the cause of action for the defendant.

Under section 89 of the Practice Act, the final judgment or order can be set aside or vacated after the term of court at which it was entered, for such errors of fact, only, as could have been corrected under a writ of error <u>coram nobis</u>. The

error of fact which may be assigned in such proceedings, must be some fact unknown to the court at the time the judgment was rendered, which, if it had been known, would have precluded the court from rendering the judgment in question. The error of fact alleged must not be one appearing on the face of the record nor one contradicting the finding of the court.

The Supreme Court of this State in the case of McCord v. Briggs & Turivas, 338 Ill. 158, in its opinion says:

> "* * * The office of the writ of error coram nobis is to bring to the attention of the court errors of fact, such as the death of either party pending the suit and before judgment therein, or infancy where the party was not properly represented by guardian, or coverture where the common law disability still exists, or insanity at the time of the trial, or a valid defense existing in the facts of the case but which, without negligence on the part of the defendants, was not made, either through duress or fraud or excusable mistake, such facts not appearing on the face of the record, and which, if known by the court, would have prevented the rendition and entry of the judgment. (People v. Noonan, supra.) It is only concerning matters of which the judgment itself is silent that the court may entertain a motion, under section 89 of the Practice Act, to correct errors in fact, and affidavits in support of such motion cannot be heard to contradict the record. Mains v. Ossner, 87 Ill. 536; People v. Noonan, supra."

See also Jacobson v. Ashkinaze, 337 Ill. 141.

The demurrer admits the facts well pleaded and we are of the opinion from the facts charged in the written motion that the defendant was lulled into a sense of security by the action of counsel for the plaintiff in conducting and carrying on negotiations for a settlement when, at the same time, he was secretly procuring a default judgment and having the damages assessed unbeknown to the defendant or its representative. If, as a matter of fact and as charged in the written motion, counsel for the plaintiff stated to the court that the defendant had been notified several times that the case had been called and did not pay any attention, and this was untrue as charged, then plaintiff by his counsel was guilty of a direct misrepresentation to the court. The court evidently believed the state-

[illegible]

[illegible]

v. [illegible]

[illegible]

[illegible]

ment to be true, where, as a matter of fact as charged by the written motion, it was false. If the court had known that this statement was false and that, as a matter of fact, negotiations were pending for a settlement of the cause, it would probably have refused to proceed with the hearing for the assessment of damages until the defendant had been properly notified. The failure of counsel for the defendant to enter the appearance of defendant, might well be called an excusable mistake, brought about by the action of counsel for plaintiff in entering into the stipulation in question and which stipulation was given to counsel for the defendant at the same time that the summons was handed him. Baird & Warner, Inc. v. Noble, 250 Ill. App. 255.

Plaintiff should not be entitled to recover, because of the conduct of his attorney, as charged in the written motion filed in this proceeding. Fair dealing would require that plaintiff's counsel inform Johnson that a default had been taken and he should not have been permitted to proceed with negotiations for settlement and, at the same time, lay a trap for the defendant. The amount of the judgment appears to be unconscionable in view of the figure named by plaintiff as the amount that plaintiff was willing to accept in settlement.

We are of the opinion that the trial court properly granted the motion to vacate the judgment and, for the reasons stated in this opinion, that order will be affirmed.

ORDER AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

35142

DAVID R. FORGAN, JOHN D. LARKIN, B. A. McDONALD, C. ROY WARREN, A. E. DUNCAN, WM. H. GRIMES, R. WALTER GRAHAM, JAMES C. FENNAGEN and C. E. VESY, Trustees of COMMERCIAL CREDIT TRUST,	)	APPEAL FROM
Appellants,	)	CIRCUIT COURT,
v.	)	COOK COUNTY.
GORDON MOTOR FINANCE CO.,	)	
Appellees.	)	263 Ill. App. 357

Opinion filed Dec. 2, 1931

MR. JUSTICE WILSON delivered the opinion of the court.

David R. Forgan and others, trustees of Commercial Credit Trust, brought its action against Gordon Motor Finance Co., a corporation, to recover possession of a certain Cord automobile. The case was tried by the court without a jury, resulting in a finding of the issues in favor of the defendant Gordon Motor Finance Co. and judgment against the plaintiff, from which judgment this appeal is taken.

The facts show that both the plaintiff and the defendant are finance corporations engaged in the business of buying commercial paper. The Auburn Woodlawn Motors, Inc. operated a retail automobile business in the City of Chicago. September 6, 1929, the Gordon Motor Finance Co., defendant, loaned the Auburn Woodlawn Motors, Inc. $2,418.50. At or about the same time the Auburn Woodlawn Motors, Inc. executed a conditional bill of sale to itself and assigned this sales contract to the defendant as security for the loan. This conditional sales contract was for a certain Cord automobile. The possession of the Cord automobile, which was the subject of the conditional sales contract referred to, was allowed to remain in the possession of and on the salesroom floor of the Auburn Woodlawn Motors, Inc.

Opinion filed Dec. 3, 1981

On or about November 20, 1929, the plaintiff purchased or received by assignment from the Auburn Woodlawn Motors, Inc. a conditional sales contract covering the Cord automobile involved in this proceeding. This sales contract of November 20, 1929, purported to be a conditional sales contract from the Auburn Woodlawn Motors, Inc. to one T. V. Allison, covering the Cord automobile which was to be used by the said Allison, as a demonstrator. Allison appears to have been a salesman for the Auburn Woodlawn Motors, Inc. Plaintiff and defendant both claim title under their respective conditional sales contracts.

The Uniform Sales Act, Chap. 121a, par. 26, sec. 23, Cahill's Illinois Revised Statutes, 1931, provides as follows:

> "26.) SALE BY A PERSON NOT THE OWNER.)
> (1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

This court has repeatedly held that where the owner of an automobile permits it to remain in the salesroom of an automobile dealer who is engaged in the business of buying and selling automobiles, he is estopped as against a bona fide purchaser from claiming under the section of the Uniform Sales Act, quoted. Illinois Bond & Investment Co. v. Gardner, 249 Ill. App. 337; National Bond & Inv. Co. v. Shirra, 255 Ill. App. 415; Gordon Motor Finance Co. v. Aetna Acceptance Co., General Number 74659, Appellate Court, First District of Illinois.

The one who places it within the power of another to commit a fraud is estopped by his conduct as against innocent purchasers for value. The case of Gordon Motor Finance Co. v. Aetna Acceptance Co., supra, is a case very much in point, both as to facts and persons involved. The Monroe referred to in that opinion was the president of the Auburn Woodlawn Motors, Inc., at that time

[illegible]

or received by [illegible] from the [illegible]

conditional sales contract [illegible]

this transaction. [illegible]

to be a conditional sales contract [illegible]

Ltd. to the [illegible]

to be used by [illegible] lease, [illegible]

to have been a conditional sales contract [illegible]

and defendant both of the title [illegible]

sales contracts.

[illegible]

Cahill's Illinois Revised [illegible]

> 96.) [illegible]
> (1) Subject to [illegible] sold by a person who is not [illegible] not sell them under [illegible] owner, the buyer acquires [illegible] the seller had, [illegible] conduct; precluded from [illegible]

[illegible]

of an automobile dealer [illegible]

mobile dealer who is engaged [illegible]

automobiles, be [illegible]

claims under the [illegible]

Illinois Bond [illegible]

National [illegible]

Finance Co. v. [illegible]

Court, First District of Illinois.

[illegible]

courts [illegible]

charges [illegible]

[illegible]

[illegible]

[illegible]

and was also the president of that company during the transactions involved in this proceeding. The Allison referred to in that case is, in all probability, the same Allison referred to in the case at bar. This court in its opinion in that case, said:

> "By selling the car to Monroe, who was engaged in the business of reselling cars in connection with his company, Gordon gave the latter an opportunity to perpetrate a fraud upon an innocent purchaser. Section 23 of the Uniform Sales Act was evidently enacted to afford protection to vendors under conditional sales contracts who could not reasonably foresee or anticipate a resale of chattels before the same were fully paid, and who through no act of theirs could be said to have made the perpetration of fraud on innocent purchasers from a conditional vendee possible. However, we do not believe the protection of the statute should be extended to those who by their own acts place the indicia of ownership in a person or corporation under circumstances where it can be reasonably foreseen that fraud on innocent persons will result therefrom. The parties knew each other, they had had previous transactions together, and plaintiff knew that Monroe and his company were engaged in the business of selling cars; therefore it was reasonable to anticipate a resale by Monroe, who had on prior occasions through his company made purchases from Gordon for the purpose of resale. Considering the evidence in the light most favorable to Gordon, it may fairly be said that he placed the instrumentality for fraud in the hands of Monroe with whose business and transactions he was fully familiar, and the fact that Monroe broke faith with Gordon, as asserted by him, in turning the Packard over to his company and allowing it to be sold to a third person, should not be permitted to affect the rights of one who had paid a valuable consideration therefor without any knowledge of the existence of the conditional sales contract between Gordon and Monroe."

The plaintiff in this proceeding had a right to assume that the Cord automobile on the salesroom floor of the Auburn Woodlawn Motors, Inc. was the property of that company and, therefore, the plaintiff had a right to assume that the contract executed by that company to Allison was a valid and binding agreement. In purchasing this conditional sales contract, from that company to Allison, it was an innocent purchaser for value and entitled to be protected as against the Gordon Motor Finance Co. which permitted the Auburn Woodlawn Motors, Inc. to perpetrate a fraud against the plaintiff.

and was also the president of that company during the transaction involved in this proceeding. The bill of exchange in that case is, in all probability, the same instrument referred to in the case at bar. This court in the Gulmon case, said:

> "By selling the goods, [illegible] engaged in the business of receiving cash in connection with his company, Gordon gave the latter an opportunity to perpetrate a fraud upon an innocent purchaser. Section 38 of the Negotiable Instrument Act was evidently adopted to afford protection to vendors under conditional sales contracts [illegible] not necessarily forbids or articulate a remedy of character for the same were fully paid, and who for [illegible] or thinks could be said to have been the perpetrators of fraud or improper procedure if a conditioner vendee [illegible]. [illegible] we do not believe the provisions of the statute [illegible] extended to those who by their [illegible] indicate [illegible] ownership in a [illegible] or conditional sales [illegible] where it can be reasonably foreseen that from [illegible] persons will result [illegible]. The petition here [illegible], they had [illegible] transactions [illegible], [illegible] line of the [illegible] of selling [illegible] where [illegible] a result by [illegible], who had [illegible] through his company made purchases from [illegible] for the [illegible] of [illegible]. Quantitatively [illegible] evidence [illegible] Gordon, [illegible] fidelity [illegible] be [illegible] tally for fraud in the [illegible] of [illegible] and transactions be [illegible] fully [illegible], [illegible] that [illegible] before [illegible] with Gordon, [illegible] turning the [illegible] over to the company [illegible] it to be sold to a third person. [illegible] not be [illegible] to affect the [illegible] [illegible] a [illegible] [illegible] ation theorist [illegible] [illegible] of the conditional sales contract [illegible] in [illegible] manner.

The Industrial [illegible] possessing the right to assume that the Ford automobile on the showroom floor of the Indian Woodlawn Motors, Inc. was the property of that company [illegible], the plaintiff had a right to assume that the contract assumed by that company to Allison was a valid and binding agreement. In purchasing this conditional sales contract, from that company to Allison, it was an innocent purchaser for value and entitled to be protected as against the Indian Motor Finance [illegible], which permitted the Auburn Woodlawn Motors, Inc. to perpetrate a fraud [illegible] the plaintiff.

This cause was tried before the court without a jury and there is no essential dispute as to the facts. It would accomplish no good purpose to remand the cause.

For the reasons stated in this opinion, the judgment of the Circuit Court is reversed and judgment is entered here finding the property in the plaintiff and assessing the plaintiff's damages at one cent.

JUDGMENT REVERSED AND JUDGMENT HERE.

HEBEL, P.J. AND FRIEND, J. CONCUR.

35154

SCHWARZENBACH HUBER CO., a Corporation,

(Plaintiff) Appellee,

v.

MORE MANUFACTURING CO., a Corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT,

COOK COUNTY.

Opinion filed Dec. 2, 1931

MR. JUSTICE WILSON delivered the opinion of the court.

Plaintiff brought its action to recover the sum of $533.84, for goods and merchandise sold and delivered to the defendant. Defendant pleaded settlement with the plaintiff March 26, 1930. An amended statement of claim was filed in which it appears that the amount claimed to be due the plaintiff was $566.87. Upon the trial the defendant introduced a certain memorandum which appears to have been entitled, "a proposed settlement," which reads as follows:

"proposed settlement Schwarzenbach Huber and Co.
account on amount due to date.

Amount of past due acct. to date	10088.21
interest charge	105.02
	10,193.23"

Defendant also introduced in evidence a memorandum which is marked, "Defendant's Exhibit 1", which appears to have been the agreement entered into after the memorandum marked, "proposed settlement", and is in words and figures as follows:

"DEFENDANT'S EXHIBIT 1

'Amount of settlement	10,193.23	
Pd. on acct.	5,250.00	
	4,943.23	
Credit by return	2,173.13	
less 6%	130.50	2044.63
Credit by adjustment		1000.00
Bal. Due.'		1898.60"

At the time this memorandum was made the defendant delivered to one Ewins, attorney for the plaintiff company, certain post dated checks

Opinion filed Dec. 2, 1931

in settlement, which were cashed as they came due and collected. August 25, 1928, defendant gave his check for $658.60, balance due under the agreement, which contained on the back the following endorsement:

> "This is the final check and in full payment under the settlement of March 26, 1928 between payee and maker as to the account of payee as it stood on that date and concerning the matters in said settlement."

This check with the condition on the back was accepted by the plaintiff and paid in due course.

Included in the account between the parties, on the day of the alleged settlement, were certain items which plaintiff claims were not included in the settlement. Upon the trial the court before whom the action was tried held that all these items were included in the settlement except one dated February 21, 1928, for $297.19, which was entered as a charge against the defendant on the account of the plaintiff, but was payable April 21, 1928. In other words, the item of $297.19, was for goods sold on February 21, and charged against the defendant with the understanding that the defendant had 60 days within which to pay for said goods. There is but one question in dispute between the parties and that is whether or not this particular item, which was not payable until after the settlement, was included in the settlement made March 26, 1928.

David More testified that he was the president of the defendant company and that he had done business with the plaintiff for a period of over three and a half years, during which time he had purchased approximately $75,000 worth of merchandise. He testified that his dealings were with Mr. Ewins, an attorney representing the plaintiff, and that, at the time of the settlement, they took into consideration all the merchandise which had been ordered by the defendant company up to the time of said settlement. He testified

in settlement, which was [illegible]

August [illegible] under the agreement, which contained [illegible] ment:

> [illegible]
> the satisfaction of [illegible]
> as to the [illegible]
> concerning [illegible]

This check with the condition [illegible] plaintiff and [illegible] to the source.

[illegible]

day of the [illegible] settlement, were certain [illegible] claims were not [illegible] before which the [illegible] included in the [illegible] 1897.10, which was [illegible] account of the [illegible] sorts, the item of [illegible] charges against the [illegible] had [illegible] question in [illegible] this particular item, which [illegible] was included in the [illegible]

[illegible]

defendant company [illegible] for a series of [illegible] purchased [illegible] that his [illegible] plaintiff, and [illegible] consider from all the [illegible] defendant company [illegible]

that both memoranda with regard to the settlement were in the handwriting of Ewins and made in Ewins' office and that he was not represented by counsel at the time; that everything was taken into consideration and included in the settlement.

Mr. Ewins, testifying for his client, plaintiff, testified that the item of $297.19, was not in dispute and that Wore told him that he did not know anything about this particular item. Upon the trial the court found in favor of the plaintiff for the item of $297.19.

It is insisted that oral evidence is not admissible to vary the terms of the settlement; that negotiations leading up to the settlement were not admissible. If this were conceded, then the memorandum agreement entered into before the final settlement agreement would be no more admissible than the conversations. If we were to accept this position of plaintiff, the only thing before the court would be defendant's exhibit 1, which shows a complete final settlement between the parties as of March 28, 1928. In such event it would necessarily follow that the item in question having been charged against the defendant on the books of the plaintiff, although not payable until later, would be included in the settlement. The agreement appears to bear the earmarks of an attempt to adjust everything between the parties up to that particular date. This understanding would be borne out by the fact that the final check, in payment of the amount agreed upon under the settlement, had the endorsement on its back that it was to be received in full settlement of the agreement of March 28, 1928, as to the account between the parties as it stood on that date. The abstract filed in the cause does not show that there were any objections taken to the testimony that was introduced in support of defendant's position that it was the understanding and intention of the parties that the settlement covered all claims. Such testimony is admissible where there is any ambiguity in the instrument as to its purpose and intent.

The sole question in the case appears to be whether or not the parties intended that the settlement covered everything including the item for $297.19. The instrument constituting the settlement having been drawn in the office of and by plaintiff's attorney, it should be construed most strongly against the plaintiff, particularly where the defendant was not represented by counsel.

While the first memorandum, referred to as the "proposed settlement", speaks of the proposed settlement as pertaining to the account on the amount due to date, nevertheless, when the final settlement account was drafted the parties may have intended to include all items in the account whether due or not. Standing alone the settlement should be so interpreted and we see no reason for altering our views upon a consideration of the testimony introduced. The notation on the back of the check given in August 1928, shows the check was given and accepted as payment in full of the account of the defendant as it stood on March 28, 1928. As we have stated, this account included the item in question.

We are of the opinion that the trial court erred in its interpretation of the agreement, and that it should be included among those items which were intended to be settled by the agreement of March 28, 1928.

For the reasons stated in this opinion the judgment of the Municipal Court is reversed and judgment is entered here for the defendant with a finding of fact.

JUDGMENT REVERSED AND JUDGMENT ENTERED HERE WITH A FINDING OF FACT.

HEBEL, P.J. AND FRIEND, J. CONCUR.

FINDING OF FACT: -

The court finds as a matter of fact that the item of $297.19, appearing in the account, dated February 21, 1928, for goods sold and delivered on that date, although payable on April 21, 1928, was included in the settlement arrived at between the parties on March 28, 1928.

35182

1327

EQUITABLE TRUST CO. OF CHICAGO, a corporation, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
A. WARSHAWSKY & CO. INC., doing business as A. Warshawsky & Co., Appellant.	

263 I.A. 658

Opinion filed Dec. 2, 1931

MR. JUSTICE WILSON delivered the opinion of the court.

The statement of claim filed in this cause shows that the action is based upon a promissory note for the sum of $1,500, payable to the order of the State Auto Parts Corporation and signed, executed and delivered by the defendant, A. Warshawsky & Co. The statement of claim shows that a further claim was based on a certain trade acceptance in the sum of $1,000, drawn by State Auto Parts Corporation on the defendant A. Warshawsky & Co. and duly accepted by the defendant, by which trade acceptance, the defendant became liable to the holder. It is also charged in the statement of claim that the plaintiff was a bona fide holder and owner of the instruments in question for value.

The note in question, marked plaintiff's exhibit 1, is a straight note, by which the defendant promised to pay 90 days after date, the sum of $1,500. There is nothing upon its face to indicate that it was accommodation paper. The trade acceptance, marked plaintiff's exhibit 2, was an instrument dated June 23, 1930, to A. Warshawsky & Company,

Opinion filed Dec. 5, 1931

the defendant herein, payable to the order of the State Auto Parts Corp. and accepted by the defendant. There was nothing on the face of this instrument to indicate that it was accommodation paper. The records of the plaintiff, Equitable Trust Co. of Chicago, show that the two instruments in question were discounted for the account of the State Auto Parts Corporation and their account credited with the amount claimed plus interest.

Some evidence was introduced for the purpose of showing that the plaintiff had knowledge, actual or implied, that the note and trade acceptance were accommodation paper. This evidence was met by testimony on the part of the plaintiff, and the court was of the opinion that there was not sufficient evidence to sustain the charge that the plaintiff had knowledge which would place it on notice at the time of the discounting of the instruments sued upon. We have examined the testimony and are of the opinion that the court properly reached this conclusion.

A manufacturing or trading corporation has the right to execute or deliver promissory notes and, even though they were accommodation paper, it would not be a defense against an innocent purchaser for value before maturity.

The court also properly sustained an objection to the admission of certain evidence, tending to show that the defendant did not receive anything of value for the note and trade acceptance. No offer was made, however, to show that defendant would prove knowledge on the part of plaintiff of this fact. The court properly excluded the evidence.

We find no reversible error in the findings of the trial court (the cause having been tried without a jury)

and for that reason, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

35310

THE REUBEN H. DONNELLEY CORPORATION, a Corporation,

Appellant,

v.

W. M. McINERNEY,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

263 I.A.658

Opinion filed Dec. 2, 1931

MR. JUSTICE WILSON delivered the opinion of the court.

Plaintiff's claim is for the breach of a contract, under which it is charged the plaintiff and the defendant entered into a written agreement, which provided that the plaintiff should print a certain advertisement of the defendant in the Chicago Classified Telephone Directory and the defendant agreed to pay $1,000 for said advertisement. The defendant in his affidavit of merits admitted that he owed the plaintiff the sum of $166.68. The issues were tried before a jury, resulting in a verdict in favor of the plaintiff for the sum of $166.68 and against plaintiff as to the balance of its claim. Judgment was entered upon the verdict and this appeal prayed and allowed.

We have not been aided in our consideration of the case by briefs on the part of the defendant.

From the facts before us it appears that the plaintiff published what is known as the Chicago Classified Telephone Directory. This publication was printed twice each year. Plaintiff's position is that the contract in question provided that the plaintiff was to print the advertisement agreed upon between the parties in the issues of July 1929 and January 1930. Proof was made by the plaintiff to the effect that the written agreement had been lost and that a diligent search had been made for it, but although it had been in their possession it could not be found. Plaintiff was, therefore,

38810

THE [illegible]
a for [illegible] tion.

[illegible]

R. M. [illegible]MAY,

[illegible]

Opinion filed Dec. 2, 1932

[illegible]

under which it is [illegible]
into a written [illegible]
print a cent in [illegible]
classified telephone directory [illegible]
$1,000 for such advertisement. [illegible]
marks admitted that [illegible]
issues were tried before [illegible]
of the plaintiff for the use of [illegible]
to the [illegible]
and this [illegible]

[illegible]

case to stand on the [illegible]

[illegible]

[illegible] the facts [illegible]
[illegible] ab [illegible]
This [illegible] was [illegible]
is that the contract in [illegible]
to print the [illegible] event [illegible]
issues of July 1[illegible] and January [illegible]
to the [illegible]
a difference [illegible] for [illegible], but [illegible]
their [illegible]

permitted to introduce secondary proof of the instrument.

Miner, a witness called by the plaintiff, testified that he talked with the defendant in May and June of 1929, and on June 6th of that year the defendant signed the contract in his presence and that he, Miner, left a duplicate with him and gave the original to Duschak at the office of the plaintiff corporation. Plaintiff's exhibit 2 was introduced and received in evidence and the witness Miner testified that it was a correct copy of the contract. He also testified that the defendant promised to pay for the advertisement in the second issue of the Chicago Classified Telephone Directory when he went to see him about payment and after that issue had been printed.

Plaintiff's exhibit 2, the copy of the contract, purports to be the agreement signed by McInerney, the defendant, agreeing to pay $1,000 on demand after the publication of the two issues of the directory. Five Hundred Dollars of this was to be for the publication of the latter period of 1929 and $500 for the publication of the first half of 1930.

Messersmith, a witness for the plaintiff, testified that he was the assistant credit manager for the plaintiff and that he saw the original contract and handled it personally, on or about August 16, 1930, and gave it to a Miss Sandel , his secretary.

Plaintiff's exhibit 4 was offered and received in evidence and purports to be a contract register, kept in the regular course of business, and contains an entry of the contracts entered into. This register contains a notation showing that on May 22, 1929, a contract was entered into with W. M. McInerney, 626 E. 63rd St., which was the business address of the defendant, and which contract as it appears on the contract register, was payable in 12 monthly installments of $83.33 each.

permitted [illegible]

[illegible]

that [illegible]

[illegible]

presence [illegible]

original [illegible]

[illegible]

the [illegible]

[illegible]

the advertisement [illegible]

Telephone [illegible]

that [illegible]

[illegible]

purports [illegible]

agreeing [illegible]

issues of the [illegible]

the [illegible]

publication [illegible]

[illegible]

that [illegible]

be [illegible]

August [illegible]

[illegible]

evidence [illegible]

course [illegible]

into. [illegible]

1959, [illegible]

it, which [illegible]

court [illegible]

[illegible]

Plaintiff's exhibit 5, offered and received in evidence, was an original record made by the compilation department of the plaintiff showing the contract with the defendant for $1,000, space given as 1/4 page, dated May 22, 1929 and solicited by A. B. Miner. Miner was the salesman who procured the contract and one of the witnesses for the plaintiff.

Lillian Sandel testified for the plaintiff that she was secretary to the credit manager of the plaintiff and that in August 1930, she saw the original contract of which plaintiff's exhibit 2 was a correct copy, and that she took it out of the bindery and replaced it with a receipt. This receipt was for a contract dated May 22, 1929, between the plaintiff corporation and McInerney for $1,000. She testified that she thereupon prepared a statement of the defendant's account and wrote a letter to the attorneys for the plaintiff and enclosed the original contract in the letter and mailed it. A copy of the letter addressed to the attorneys for the plaintiff stated that the contract was enclosed for collection for the sum of $666.68. At the same time she mailed the letter she prepared a memorandum, which is offered in evidence, showing that the claim had been sent to the attorneys for collection.

Jaffe, a witness for the plaintiff, testified that he was one of the attorneys to whom the communication containing the original contract was mailed; that he had searched his records, but was unable to find the instrument.

McInerney, in his own behalf, testified that he talked with Miner about putting an ad in the directory and that Miner left some papers with him to sign, but that he would not sign them; that he did not give Miner an order for the 1929 advertisement.

On August 12, 1930, defendant wrote the plaintiff corporation admitting that he owed the sum of $186.66, balance due

[illegible]

evidence, was so [illegible]
of the plaintiff [illegible]
space given to [illegible]
Miner. Miner was the [illegible]
of the witnesses for the plaintiff.

[illegible]
was necessary to the [illegible]
August 1890, and was the original document [illegible]
exhibit 2 was a correct copy, but [illegible]
and replaced it with [illegible]
dated May [illegible], 1890, [illegible]
for [illegible]. The testimony [illegible]
of the defendant's counsel [illegible]
the plaintiff [illegible]
mailed it. [illegible] copy of [illegible]
the plaintiff stated that [illegible]
for the sum of $[illegible].
preparer [illegible]
the claim [illegible]

[illegible]
was one of the witnesses [illegible]
original [illegible]
was unable to read [illegible]

[illegible]
with [illegible]
none. [illegible] was also his to sign, but [illegible]
be all [illegible] for [illegible].

[illegible]
[illegible]

on the advertisement in the directory published in the last half of 1929, but that in view of the fact that they had notified him that they would not insert his advertisement for 1930 unless he paid this amount, he did not believe that he was liable and that they took their chances in publishing the advertisement in the first half of 1930. This would indicate that there was a contract for the entire period of 12 months. The effect of the letter was that the defendant was to be released because the plaintiff had threatened not to continue with the contract for the year 1930 until the balance for the year 1929 had been paid. The defendant O.K'd the advertisement published, which would indicate that he had knowledge of the fact that there was some sort of an agreement between the plaintiff and the defendant. In his affidavit of merits filed in the cause and signed by the defendant, he ordered the advertisement inserted in the publication for the six months of 1929, and, that prior to the first of January 1930, he instructed the plaintiff not to insert his advertisement for any portion of the year 1930. The natural inference to be drawn from this statement in the affidavit of merits would be that there was a contract for 12 months and that the defendant had instructed the plaintiff not to continue with the publishing of the advertisement sued upon.

In our opinion the overwhelming weight of the evidence appears to support the contention of plaintiff that there was a written contract for $1,000 to cover the advertisement in question in the publication of the telephone directory for the latter half of the year 1929 and the first half of the year 1930. The verdict for $186.68 which was for a balance due on the 1929 publication only, is against the clear weight and preponderance of the evidence. The Municipal Court should have granted a new trial.

on the [illegible] instrument [illegible]
of 18[illegible], [illegible]
that they would not [illegible]
this reason, [illegible]
their [illegible]
1880. This [illegible]
period of 1[illegible] months. [illegible]
defendant [illegible]
not to continue [illegible]
for the year [illegible]
meant [illegible]
that the [illegible]
and the [illegible]
and signed by the [illegible]
in the [illegible]
the first of [illegible]
his [illegible]
before [illegible]
would [illegible]
and had [illegible]
of the [illegible]

[illegible]

[illegible]
[illegible]
the [illegible]
year [illegible]
which [illegible]
the [illegible]
[illegible]

Because of the view we entertain that the verdict is against the clear weight of the evidence, the judgment is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

35612

CODY TRUST COMPANY,

Complainant- Appellee,

v.

NATHAN GROSSMAN, et al.,

Defendants.

ON THE INTERLOCUTORY APPEAL OF JAMES H. HOOPER,

Defendant - Appellant.

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT OF

COOK COUNTY.

Opinion filed Dec. 2, 1931

MR. JUSTICE WILSON delivered the opinion of the court.

This is an appeal from an interlocutory order appointing a receiver for certain premises on a bill to foreclose a trust deed. Complainant's bill was filed August 29, 1931, and the trust deed set out in the bill was given to secure an issue of 350 bonds of the aggregate amount of $160,000, together with interest thereon. The trust deed conveyed a leasehold interest on the real estate in question and also pledged the rents, issues and profits. It contained also the general provisions found in trust deeds of a like character which provided that on default in the payment of principal or interest, the trustee named in the trust deed might, without the action of any of the bondholders and without the necessity of possession of any of the bonds, institute suit to protect the rights of the various bondholders.

The bill charges default in the payment of $3,000 of the bonds due May 1, 1931, and in the payment of interest coupons due the same date. It further charges default in the payment of ground rent amounting to $1,256.88, as a result of which the leasehold estate might be terminated and the security of the trust deed lost. The bill charges further that suit is brought on behalf of all the

Opinion filed Dec. 2, 1931

holders of bonds and that the premises could not be sold for more than $144,000, and are scant security.

Notice of the application for a receiver was served upon 226 Wabash Avenue Shops Building Corporation, the record owner of title.

Error is assigned because it is not alleged that the maker of the bond was insolvent; that it does not appear that the complainant owns or has in its possession any of said bonds; that the bill of complaint was not properly verified and because the obligee named in complainant's bond is not the proper person in whose favor the bond should run. There is no force in the assignment of error to the effect that it is not alleged that the maker of the bonds is insolvent, nor is there any force in the argument that it does not appear from the bill as to whether or not the trustee was an owner of any of the bonds involved. We have examined the verifications of the bill of complaint and find that it is sufficient. The bond ran in favor of the record owner of the property at the time the bill was filed and is sufficient. If it should develop that an improper person is named as obligee, the chancellor may require a proper bond at any time.

We see no reason for disturbing the order and, for that reason, the order of the Circuit Court appointing the receiver is affirmed.

ORDER AFFIRMED.

NEBEL, P.J. AND BRIEWE, J. CONCUR.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General Number 8273 Agenda No. 24

OSCAR ENNENGA, Appellant vs. JAMES CHILTON, a Minor, by FREDA CHILTON, His Next Friend, Appellee.	)	Appeal from Circuit Court, Stephenson County.

BOGGS, J.

An action in trespass was instituted by appellee against appellant, in the circuit court of ~~Winnebago~~ county, to recover damages growing out of an assault.

The declaration contained two counts. The first count averred that on May 6th, 1929, appellant "with force in arms, in the county aforesaid, assaulted the plaintiff, James Chilton, then and there a minor of the age of fourteen years, and then and there violently seized and laid hold of him and jerked and dragged the said James Chilton through the streets of the city of Freeport, and threw the said plaintiff, James Chilton, into a certain garage, * * * then and there causing said plaintiff to fall upon a motor vehicle with great force, and with great force and violence shook and pulled about the plaintiff and threw him down to and upon a certain cement floor* * * and also with great force and violence tore and damaged the clothes of the plaintiff," averring damages, etc. The second count charged that appellant "with force in arms, made an assault on the plaintiff and then and there beat, bruised, wounded and ill-treated him; and other wrongs to the plaintiff then and there did; against the peace of this State," etc.

To said declaration, appellant filed a plea of the general issue. A trial was had, resulting in a verdict and judgment in favor of appellee for $5,000. To reverse said judgment, this

appeal is prosecuted.

On May 6, 1929, about seven o'clock P. M., appellee and some other boys were in front of a hamburger stand in said city when appellant and his wife alighted from their automobile, and started down the street on the sidewalk. After they had proceeded a few steps appellant turned back, took hold of appellee and proceeded with him down the street. On reaching a garage, referred to as the Brokhausen garage, appellant opened the screen door and pushed or shoved appellee into the garage.

Appellee's testimony is to the effect that appellant took him by the collar of his shirt, forcibly took him down the street, and pushed or shoved him into said garage; that he fell against the fender of an automobile and received injuries, from which he is still suffering.

On the trial, it was stipulated that appellant was worth $75,000.

Appellee's mother testified that she called appellant on the phone and stated, "I am the mother of the boy that you took up the street * * * and I am calling and asking you why you did it, and what the boy did that you should do such a thing," that appellant answered, "Well, I did it for my own amusement." This witness further testified that she stated certain people had called her up by telephone in reference to the matter, and that appellant replied, "You can be glad when they called you that they didn't tell you that he had been murdered." Appellant admitted having stated to appellee's mother that what he did was done for his own amusement, but denied having said, "you can be glad when they called you, that they didn't tell you that he had been murdered."

Joe Sheets testified on behalf of appellee that appellant "threw the kid in the garage, up against the car. * * * He (appellant) turned around and was looking at Mr. Moore and myself, and said 'take care of the damned', or 'God damned little brat,' I don't know which, it all happened so quickly. Mr. Ennenga went down the street fast. He was mad about something."

appeal as grounds.

[illegible]

some other boys were [illegible]

when approaching [illegible]

attempt [illegible]

a few [illegible]

proceeded [illegible]

fenced in [illegible]

door [illegible]

[illegible]

him by [illegible]

and [illegible]

the fence [illegible]

is still [illegible].

[illegible]

375,000.

[illegible]

the plan [illegible]

up the [illegible]

it, [illegible]

appeal [illegible]

witness [illegible]

called [illegible]

appellant [illegible]

they did [illegible]

admitted [illegible]

was done [illegible]

glad [illegible]

been [illegible].

[illegible]

"throw [illegible]

(a) [illegible]

and [illegible]

I don't [illegible]

down [illegible]."

Appellant testified that after he and his wife had alighted from his car, "I got about half-way across the sidewalk. My wife was getting out of the car and stepped up on the higher sidewalk; the boy pointed down toward her and laughed and said, 'Ha, ha, ha,' and pointed toward her; the boy was James Chilton plaintiff in this case. I got somewhat angry, and I started east, toward the hotel on the north side of the street. * * * I looked around for a policeman, I didn't see a policeman, so I took a step or two on my way toward the hotel, down the sidewalk, and then I stopped again and looked back at James Chilton. I looked at him and he was laughing. I turned around and got hold of him and began walking up the street toward the police station. I got hold of him and walked him along with me, up the street. I was quite angry. * * * I said to him, 'I am going to take you to the police station; you can't do this again,' * * * I didn't say anything more to the boy. * * * * I had come about to the beginning of the Brokhausen garage building when I saw my friend Jim Moore, standing beside the gasoline pump, giving gasoline to a car. * * * I didn't go any farther toward the police station, and I took the boy, Jim Chilton, and pushed him into the Brokhausen garage door."

It is first contended that the averments of the declaration are not sufficient to sustain exemplary damages; that, in order that exemplary or punitive damages be allowed, the declaration must charge malice. If it is meant that such charge must be made in express terms, the point is not well taken.

"An assault and battery is the unlawful beating of another." Cahill's Stat., chap. 38, sec. 21.

"Malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse." Cooley on Torts, 209, note 3; in re Murray, 109 Ill. 31-33.

As a general rule of pleading, it is not necessary to claim exemplary damages by name, it being sufficient that the facts alleged and the proof be such as to warrant their assessment.

8 R C L 626; Taneski v. St. Louis N. B. T. Ry. Co, 230 Ill. 300-304. Prussner v. Brady, 136 App. 395-398.

If it appears that a party has acted with a wanton, willful or reckless disregard of the rights of a party, malice will be inferred and the jury may allow exemplary damages. Illinois & St. L. Ry. & Coal Co. v. Cobb, 68 Ill. 53; Farrell v. Warren, 51 Ill. 467; Taneski v. St. Louis N. B. T. Ry. Co, supra 304.

Malice is inferred where an assault and battery is committed with a reckless disregard of the rights of the person assaulted. Hinton v. Muhlman, 201 App. 177-179.

The appellate Court of the First District, in In Re John Bobzin, 220 App. 470, at page 471 says:

"In Ketterman v. People, 181 App. 682, it is held that malice is the gist of an action of trespass vi et armis for an assault and battery."

In Drohn v. Brewer, 77 Ill. 280, the court in discussing the matter of exemplary damages at page 283 says:

"If, however, the assault was made with considerable provocation and without malice, and yet if the assault was of a wanton, gross and outrageous character, which the evidence tends to establish was the case, then the plaintiff might recover exemplary damages." Citing Cedric on Damages, 6 Ed. 568.

It is also contended by counsel for appellant that, even if it be held that the declaration is otherwise sufficient to support a verdict for exemplary damages, the use of the words "with force in arms" instead of "with force and arms", while sufficient where actual damages only are sought to be recovered, is not sufficient where exemplary damages are claimed. Evidently the use of these words was a clerical error, and in considering the sufficiency of the declaration, we are so holding.

It being charged, among other things, that appellee, at the time in question, was only fourteen years of age, the averments of the declaration are clearly sufficient to support a verdict and judgment for punitive damages, if warranted by the evidence.

It is next insisted that the court erred in striking from the record the testimony of Dr. Best. In this connection it is contended by counsel for appellant that the court struck all of the testimony of Dr. Best, not only his testimony in regard to what he found from an examination of the x-ray picture, but his testimony with reference to what he found in treating appellee as his family physician.

The record discloses that the court did not strike the whole of Dr. Best's testimony, but only so much thereof as had to do with his interpretation of said x-ray picture. As to the court's ruling in excluding the doctor's testimony on the x-ray picture, there was no error, for the reason that the doctor testified he did not see the x-ray picture taken, and the party who took the same was not placed on the stand to identify it.

It is also insisted that the court erred in refusing to admit in evidence a certain school record. Appellee had testified to the effect that on account of his injuries he had been absent from school for a month during that school year. Said record was offered by appellant to show that, in the preceding year, appellee had been irregular in his school attendance. The party who had charge of the record stated that she had no knowledge with reference to its accuracy. It is insisted by appellee that a sufficient foundation was not laid for its admission. Without reference to that question, the court did not err in refusing to admit said record, as appellee's school attendance prior to his injury was not an issue in the case.

It is next insisted that the court erred in giving appellee's second instruction, which is as follows:

"The Court instructs the jury that if they believe from the evidence that the defendant assaulted the plaintiff without any provocation, and that such assault was a wanton and aggravated one, and that the public good, or justice to the plaintiff, or both, demand it, then the law is that they are not confined in their verdict to actual damages, if you believe from the evidence that any such are proven, but may give exemplary damages not only

It is next [illegible] the [illegible] in keeping from the record the [illegible] contended by counsel for [illegible] testimony of Dr. Dock, [illegible] found in exact [illegible] with reference [illegible] physicians.

The record of [illegible] the whole of Dr. Dock's [illegible] do with his [illegible] ruling in question, the [illegible] there was no error, [illegible] did not see [illegible] same was not [illegible] admit in evidence a certain [illegible] to the effect that [illegible] from school for a month [illegible] offered by appellant [illegible] had been irregular in the school attendance. [illegible] charge of the school [illegible] to its authority, [illegible] found [illegible] that our action, the court [illegible] as appellants [illegible] issue in the case.

It is [illegible] second instruction, which is as follows:

"The court [illegible] the jury that [illegible] the evidence [illegible] any provocation, [illegible] one, and that [illegible] both, deny it, then the [illegible] their verdict [illegible]

to compensate the plaintiff, but to punish the defendant for such wanton assault, if such is shown by the evidence, not exceeding the amount claimed in the declaration."

It is insisted that this instruction is erroneous in referring the jury to the amount of the ad dammum. The earlier cases seem to have held that an instruction was not objectionable on that account. Foote v. Nichols, 28 Ill. 488; Lake Shore & M. S. Ry. Co. v. Parker, 131 Ill. 557-567; Central Ry. Co. v. Bannister, 195 Ill. 48-53; Kellyville Coal Co. v. Strine, 217 Ill. 516-533; The more recent cases criticize instructions of this character, but have not held the giving of the same to be reversible error. East St. L. C. Ry. Co. v. O'Hara, 150 Ill. 580-584; Davis v. Michigan C. R. R. Co. 294 Ill. 355-359. While we do not approve the giving of said instruction, we would not be warranted in reversing the judgment on that account.

It is also insisted that the court erred in refusing appellant's first, second, third and fourth refused instructions. Appellant's first refused instruction is as follows:

"The Court instructs the jury that if you believe from a preponderance of the evidence in this case that the defendant Oscar Ennenga wrongfully laid hands on and pushed the plaintiff, James Chilton, yet if you further believe from the evidence that the plaintiff gave provocation for the conduct of the defendant at the time and place where the injury is alleged to have taken place, the jury may, in assessing damages against the defendant, in case you believe from a preponderance of all the evidence that the plaintiff is entitled to damages, take into consideration the wrongful conduct of the plaintiff towards the defendant or his wife, if you believe from the evidence in the case that any wrongful conduct has been shown on the part of the plaintiff by the evidence."

The court did not err in refusing this instruction, for the following reasons: First, the language, "if you further believe

to compensate the [illegible] for such
wanton neglect, it would [illegible] exceeding
the amount claimed in [illegible].

It is [illegible] in con-
forming the [illegible] amount. [illegible] seems
seem to [illegible] that
account. [illegible] v. [illegible] 107 Ill.
48-52; [illegible] recent case [illegible] not hold that having [illegible]
L. [illegible] 104 Ill. 272-277. [illegible] of such [illegible] judgment [illegible].

It is also [illegible] appellant's [illegible]
Appellant's first [illegible]

"The [illegible] a preponderance of [illegible] Ocean Insurance Company [illegible] Issues Utility, [illegible] the plaintiff [illegible] at the time [illegible] place, [illegible] in some [illegible] the plaintiff is entitled [illegible] wrongful conduct [illegible] wife, if [illegible] full compensation [illegible] evidence."

[illegible] the following [illegible]

from the evidence that the plaintiff gave provocation for the conduct of the defendant," leaves to the jury the question as to whether there was provocation. Second, it assumes that there could be provocation by words or actions, which might warrant the use of actual force. Third, any provocation there may have been could only be considered in mitigation of the punitive damages and could not be at all considered as to the actual damages.

While we hold that this instruction was properly refused, appellant is clearly entitled to have a properly guarded instruction given on that question. Donnelly v. Harris, 41 Ill. 126-128.

Appellant's second, third and fourth refused instructions are as follows:

Second "The plaintiff in this case is James Chilton and the defendant Oscar Ennenga."

Third "The Court instructs the jury that a husband is within his legal rights to protect his wife in public places from the insults and insulting remarks made to or about her by third persons, and this right applies to the insults and insulting remarks of a minor as well as to adults, if you believe that said minor has reached the age of discretion."

Fourth "The Court instructs the jury that a minor is liable for his tort and not the parent, unless the parent aids or assists the minor in committing such torts."

These instructions are all abstract in form. The third and fourth are also misleading in character. The court did not err in refusing said instructions.

Lastly it is insisted that, even conceding that appellee is entitled to exemplary damages, the verdict of the jury is so excessive that the judgment should be reversed on that account.

While ordinarily judgments are not reversed on account of the amount evidently allowed as punitive damages, still, if the verdict of the jury is so large that it is manifest that the jury were not warranted in assessing the amount it did for punitive damages in addition to actual damages, the court should set aside

from the evidence that [illegible] for the conduct of the defendant, [illegible] to whether there was [illegible] could be proved [illegible] of actual [illegible] only be considered in [illegible] not be [illegible] all [illegible]

While we hold that [illegible] appellant is clearly entitled [illegible] tion given on this record. [illegible] are as follows:

[illegible] "The [illegible] the date [illegible]

Third "The [illegible] within the legal [illegible] the insanity of the [illegible] poration, and this [illegible] marks of a [illegible] minor has reached [illegible]

Fourth "The [illegible] liable for his acts [illegible] or negatives the minor [illegible]

These instructions [illegible] and fourth are also [illegible] er in refusing [illegible]

Liability in [illegible] is confined to [illegible] exercising [illegible]

"The [illegible] of the [illegible] the verdict of [illegible] they were not warranted [illegible] damages in [illegible]

the verdict. See Cutler v. Smith, 57 Ill. 252-257; Eshelman v. Rawalt, 298 Ill. 192-197.

We hold that the damages in this case are so excessive as to require a reversal of the judgment, notwithstanding our holding that the jury would have the right, on the record, to award exemplary damages.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____
Clerk of the Appellate Court

(88416—1M—5-28) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On 1931 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

A. J. ASHLEY, Defendant in Error	:	
vs.	:	Writ of Error to Circuit Court of Iroquois County.
THE FARMERS' PIONEER MUTUAL FIRE AND LIGHTNING INSURANCE COMPANY, Plaintiff in Error,	:	

Jones, J:

A. J. Ashley, plaintiff, recovered a judgment for $10,292.50 and costs against defendant insurance company on three fire insurance policies covering plaintiff's farm residence, barns, and other farm buildings, with their contents.

Each of the policies contained a provision that the assured shall forthwith give notice of any loss to the secretary of the company, and within thirty days after such loss, deliver to some officer of the company a particular account of such loss, signed and sworn to by him. The seventh, eighth, and ninth counts of the amended declaration set up a waiver of said provisions by averring that after the fire, defendant was by its duly authorized agent forthwith apprised thereof, and being so apprised, informed plaintiff that it had actual notice thereof, and that there was nothing further required of plaintiff; that defendant, through its officers and agents, further informed plaintiff there was no reason for refusing to pay the loss under said policies, other than it was believed by defendant that plaintiff was involved or was to blame for the fire; that the company was ready and willing to pay the loss immediately, were it not for the fact that it considered plaintiff to blame for the burning; that owing to plaintiff's absence from the State of Illinois and his illness, he was unable to make proof of loss within thirty days from the date of such loss; and that defendant, through its officers and agents, by the means aforesaid, waived any further proof of loss.

Each count of the declaration averred the furnishing of proofs of loss on March 25, 1927, about 43 days after the fire.

The fire occurred on February 11, 1927, while plaintiff was at Hot Springs, Arkansas for medical treatment. The house and some of the farm buildings, and a lot of personal property was entirely consumed and no other property was saved. Plaintiff testified that after completing his treatment at Hot Springs, he returned to his farm on March 6th, and went immediately to the home of one Holz, secretary of defendant company, and discussed the fire with him; and that Holz said he could do nothing as he was waiting for the Fire Marshal, and that there was nothing for the plaintiff to do. When the written proofs of loss were furnished Holz on March 29th, 1927, he accepted them, and it appears they were retained by the company without objection. In November of the same year, the company notified the insured in writing to appear at the residence of the secretary of the company for examination under oath, pursuant to the terms of the policies, in reference to the proofs of loss he had filed. He complied with the notice and was examined by Holz.

After this appeal was perfected, plaintiff moved to strike the bill of exceptions from the record, on the ground that the bill of exceptions as filed contained the argument of counsel, and the copy which was left with plaintiff's attorneys, previous to its signing, did not contain it.

It is not shown that the copy left with defendant's attorneys was not an exact copy of the proposed bill of exceptions presented to the trial judge. The record indicates that the arguments were inserted after the bill was presented. It is not required that the copy left with opposing counsel must contain all that is to be embraced in the bill as finally settled and signed. (Russell v. Hayes, 39 Ill. App. 198.) So far as shown by the record, a copy of the proposed bill was in good faith left with defendant's attorneys. In the settlement of a bill of exceptions, the trial judge exercises a wide discretionary power. The determination of what it shall contain is for him and is a judicial act. Were parties do not

agree, he must decide as to the proper contents of the bill, and proceed to settle and sign it accordingly. (People v. Chetlain, 219 Ill. 248.) In the absence of a showing to the contrary, the trial judge is presumed not to have abused the discretion reposed in him.

The general rule is that bills of exceptions must be signed within the time prescribed, (3 C. J. Appeal and Error, 144.) and they will not be stricken for any irregularities in practice, especially where the irregularity is that of the trial Judge. (4 C. J. Appeal and Error, 335.) In this case, it does not appear that the bill is in any sense inaccurate; therefore the motion to strike it from the record is denied.

It is insisted that there was a failure to prove the avverments of the declaration, and each and every count thereof. No motion was made at the trial to exclude the evidence or to direct a verdict for defendant, and the question of sufficiency of the evidence to support the verdict was not raised in the motion for a new trial or otherwise. It cannot now be raised on appeal. (Sugar Creek Mining Company v. Peterson, 177 Ill. 314.) No error has been assigned as to the denial of the motion for a new trial; therefore defendant cannot urge that the verdict was against the weight of the evidence. In the absence of such an assignment, the sufficiency of the evidence to support the verdict cannot be raised, and no question as to the weight of the evidence is properly before us. (Diggett v. Strum, 243 Ill. [illegible], 976; Drake Standard Boiling Works v. Crossman, 139 Ill. App. 209.)

We hold that the retention of the proofs of loss without objection, and the giving of the notice by the company in November, 1927, for the examination of plaintiff with respect to the proofs of loss, together with such examination, under the terms of the policies, constitute a waiver of the requirement that such proofs of loss should be filed within thirty days after the date of the fire. (Jurgensen v. Williamsburg

City Fire Insurance Company, 204 Ill. pp. [illegible]; [illegible] v. National Fire Insurance Co., [illegible] Ill. (pp. 1.) [illegible] defendant cannot be heard to say that the contract is valid for one purpose and at the same time that it is invalid for all other purposes. (Bennett v. Union Service Life Insurance Company, 203 Ill. 459.)

There was no reversible error in permitting the plaintiff to testify that in December, 1926, defendant paid a small loss under the same policies involved here, without requiring him to furnish proofs of loss. While a waiver of proofs of a small loss by fire may not be sufficient of itself to excuse an insured from furnishing proofs on the larger fire, still, in this case, it was proper to consider it along with other facts and circumstances in evidence, in determining whether there had been a waiver of proofs as to the instant loss.

The trial court did not err in admitting testimony as to the loss on property destroyed, but not included in the claim by the fire. The rule is well settled that under an agreement of total loss of property insured, a recovery may be had for a partial loss under the policy. (Carriers [illegible] Insurance Company v. Whitehill, 75 Ill. 587.) Proofs of loss are not to be considered in ascertaining the amount of damages, (Knickerbocker Insurance Co. v. Foule, 80 Ill. [illegible]) but the loss must be shown by other evidence. (German Insurance Company v. Bear, 65 Ill. pp. 110). There was ample testimony on the question of the amount of the loss outside the [illegible] offered in evidence.

Complaint is made that there was error in the giving and refusing of instructions. The instructions complained of are not set out in defendant's brief and argument, but are referred to only by their number. They are, therefore, not properly before this Court. (Lord v. Home Accident Company, 253 Ill. pp. 20).

If the jury believed the testimony on the part of plaintiff as to the value of the property destroyed, the verdict is not excessive. We perceive no prejudicial error in the rulings on objections to the argument of counsel.

The judgment of the trial court is affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____
Clerk of the Appellate Court

(88416—1M—5-28) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On APR 9 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8269 Agenda 20

SOPHIA MUNSON, Appellee vs. THE CITY OF OTTAWA, a MUNICIPAL CORPORATION, Appellant	Appeal from La Salle County.

Jones, J.

Sophia Munson instituted a suit against the City of Ottawa to recover for injuries alleged to have been sustained in a fall on a defective sidewalk. The declaration contained three counts. The first count charged that the defendant failed to use reasonable care to keep the sidewalk in reasonably good repair and condition. The second count charged that defendant negligently suffered the sidewalk to remain in bad and unsafe repair and condition, and permitted some of the bricks to be removed and taken away and other bricks to become loose and out of place and torn up. The third count is practically the same as the second. Each count averred the exercise of ordinary care on the part of plaintiff, and that she unavoidably stepped upon a loose brick and was thereby injured. A verdict was returned in favor of plaintiff for $2500 and judgment was entered thereon.

It is contended that the evidence does not show the defendant was negligent. Several witnesses testified that the sidewalk on which plaintiff fell had been in a bad state of repair for some months prior to the accident. The testimony of one witness tended to show that previous to the time of the accident she had notified one or more officers of the city of the walk's condition, and on the whole, the evidence fairly tends to prove the walk had been in a bad state of repair for a sufficient length of time prior to the date of the injury to charge the defendant with knowledge of such condition. In that situation,

defendant's liability for damages is the same as if it had actual notice. (Curtis v. Paris, 234 Ill. App. 157; Murphysboro v. O'Riley, 36 Ill. App. 157.) Whether or not plaintiff was in the exercise of due care for her own safety immediately before and at the time of the accident was a question of fact and the finding of the jury seems amply supported by the evidence.

The declaration averred that, by reason of her injuries, plaintiff was hindered from transacting her business and affairs and prevented from doing her usual household duties and transacting her other business and affairs. The Court admitted testimony tending to show that after her injury, she was not able to do her ordinary work, and that prior to the injury, she had been keeping boarders and roomers, and had also engaged in paper hanging. It is claimed that under the averments of the declaration, such testimony was not admissible, but we think the averments were broad enough to admit it and that the trial court committed no error in that regard. (Village of Chatsworth v. Eliza Rowe, 166 Ill. 114.)

The first sentence of plaintiff's instruction No. 1 told the jury, as a matter of law, that it is the duty of every municipal corporation in this state to keep its sidewalks in a reasonably safe condition for the use of the public. Such is not the law. The duty of a municipality is to exercise ordinary care to keep its sidewalks in a reasonably safe condition for the use of the public. After the aforesaid incorrect statement of an abstract proposition of law, the instruction proceeds to make particular reference to the case on trial, and in doing so, gives a correct statement of the rule. Taking the instruction as a whole, it could not have misled the jury, and while it directed a verdict, the direction was based upon all of the elements necessary to a finding in favor of the plaintiff. It expressly told the jury that in order to find a verdict for the plaintiff, it was the duty of the plaintiff to prove by the greater weight of evidence that the sidewalk was in a defective, unsafe, or dangerous condition, and that the defendant, the City of Ottawa, had notice thereof and neglected to use reasonable and ordinary care in repairing the

defendants liability [illegible]
notice. [illegible] v. Peale, [illegible]
56 III. App. 147, [illegible]
due care for [illegible]
accident was [illegible]
supply supported [illegible]

[illegible]

plaintiff [illegible]
and prev[illegible]
her other [illegible]
ing to show [illegible]
ordinary [illegible]
boarders [illegible]
is claimed that [illegible]
many was [illegible]
enough [illegible]
in that [illegible]

[illegible]

told the [illegible]
municipal [illegible]
reasonable [illegible]
not the fact. The [illegible]
care to [illegible]
the use of [illegible]
of an [illegible]
more [illegible]
given [illegible]
a whole, [illegible]
a verdict, [illegible]
to a [illegible]
that in [illegible]
of the [illegible]
the [illegible]
and that [illegible]
negligent [illegible]

the same and keeping it in a reasonably safe condition. We cannot commend the instruction because of the incorrect statement in its first sentence, but we do not hesitate to hold that there was no reversible error in the giving of the instruction in its entirety. Under a fair interpretation of the language employed, there was no omission of any element essential to an instruction which directs a verdict.

From what we have said with respect to the admissibility of evidence relating to plaintiff's incapacity to perform the work of hanging paper and keeping boarders, it follows that there was no error in the giving of plaintiff's sixth instruction.

The judgment should be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }ss.
SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____
Clerk of the Appellate Court

(88416—1M—5-28) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUN 18 1931 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

ROANOKE STATE BANK OF ROANOKE, ILLINOIS, Appellee,	)	APPEAL FROM THE CIRCUIT COURT OF WOODFORD COUNTY.
-vs-	)	
DAVID C. BELSLEY, et al (DAVID C. BELSLEY, Appellant).	)	

Jett, J.

This is an appeal by David C. Belsley, appellant, from a decree entered June 9, 1930, against him in favor of Roanoke State Bank, appellee, directing appellant to pay to appellee the amount of a certain judgment entered against him in a suit at law for the sum of $11,330.00 together with interest thereon at the rate of 5% per annum from December 28th, 1929, and all costs accruing on said judgment and the costs of this suit, within 60 days, and if the appellant does not pay ~~said~~ said judgment, interest and costs as aforesaid, then and in that event, 150 shares of the capital stock of appellee bank owned by said appellant be sold at public auction subject to the claim of the Central National Bank and Trust Company of Peoria, Illinois, for $4,000.00 with interest thereon at the rate of 6% per annum from January 27, 1930.

On December 28, 1929, appellee obtained a judgment by confession against the said David C. Belsley, appellant, on four promissory notes for $11,330.00 and costs. The sum of $11,330.00 includes the sum of $1,030.00 attorney's fees allowed in the cause in which the judgment was confessed. On December 30, 1929, execution was issued on this judgment and delivered to one C. R. Mars, sheriff of Woodford County. On January 3, 1930, the said sheriff made a return of the execution in the following language: "I Hereby return the within execution wholly unsatisfied, by order of the plaintiff's attorneys, Ridgley & Ridgley."

Appellee filed its bill on January 3, 1930, being the same day the execution on the judgment was returned unsatisfied. In said bill it is alleged that the execution was issued and that it

was returned wholly unsatisfied and that appellant owned 150 shares of the stock of appellee bank. It is further alleged in said bill that appellee did not have the possession of the stock; that the sheriff was unable to seize the certificates and the appellant did not surrender them; that appellant is a resident of Woodford County and had sold and conveyed all his real estate in Woodford and McLean Counties and had no other property subject to levy and sale; that appellee is without remedy save in a court of equity and prays for an answer under oath to certain interrogatories, chiefly concerning the ownership and location of the stock in question and a prayer for injunctive relief to restrain any transfer or incumbrance of the stock in question.

To the bill appellant filed a demurrer which was overruled. After the overruling of the demurrer appellant answered the bill admitting the obtaining of the judgment against him but denied that the amount due from the appellant to appellee was $11,330.00, answering that it was $9797.60; he admitted ownership of the stock in question in appellee bank and alleged that only one of the notes put in judgment by appellee, a note in the sum of $6,000.00, was due when judgment was entered; that the notes were put in judgment without notice to the appellant and denied appellee is entitled to the relief prayed for or that there is any equity in said bill.

The principal questions for determination are whether or not, in view of the state of the record, appellee is in a position under the law to maintain its creditor's bill and whether the resort to a court of equity was a proper one.

It is the contention of the appellant that in order for the creditor's bill to be available it was necessary that the execution issued on the judgment by confession should have been returned nulla bona; that the return and the record clearly show appellee had not exhausted its legal remedies and was therefore not entitled to the extraordinary remedy of a creditor's bill.

It is the contention of appellee that appellant is not in a position to raise the questions on which he relies for a reversal of the decree because he did not properly preserve them either by demurrer or by his answer to the bill and for that reason they were waived.

The record discloses that a demurrer was filed to the bill and that it was overruled. If the bill filed by appellee be deemed not to have alleged a cause for equitable cognizance, the demurrer of appellant entitled him to raise the objection of the adequacy of the remedy of appellee at law unless it appears on consideration of the whole case appellee's legal remedy was inadequate and that it was entitled to equitable relief.

In Stemm v. Gavin, 255 Ill. 480, at page 482 the court said: "A defendant, by answering, waives the right to assign error on the overruling of the demurrer, but upon the final consideration of the whole case, if it appears that the complainant is not entitled to the relief sought, the defendant may have the benefit of the same point raised by the demurrer."

In speaking of general demurrers in Law vs. Ware, 238 Ill. 360, at page 364, it was said: "The objection (the objection of the existence of an adequate remedy at law) is properly taken by demurrer, and if so taken, the demurrer may be general for want of equity. All matters which go to the jurisdiction of the court may be taken advantage of by demurrer, whether especially pointed out in the demurrer or not, and the objection may be called to the attention of the court on the argument of the demurrer."

It is said by appellee that, as the answer to the bill does not state it had an adequate remedy at law, appellant should not be permitted to raise that question. This question was considered in Toledo, St. Louis & New Orleans R. R. Co. vs. St. Louis & Ohio River R. R. Co., et al, 208 Ill. 623, and at page 634 the court said: "The bill on its face states a good cause of action, because it is alleged in apt words that the deed of the Ohio River Company was obtained by fraud and misrepresentation. The lack of jurisdiction did not appear on the hearing until that question was disposed of. We think this rather falls within the class of cases discussed in Richards v. Lake Shore and Michigan Southern Ry. Co. 124 Ill. 516, of which it is there said: 'It is a fundamental principal that parties to a suit cannot by consent confer jurisdiction with respect to the subject matter of the suit, by stipulation or consent, for that is fixed by the law and is consequently beyond the control of the parties.'"

If the allegations of appellee's bill disclosed an

The record discloses that a demurrer, [illegible] the bill and that it was overruled. In the bill filed [illegible] deemed not to have alleged a [illegible] demurrer of sufficient [illegible] adequacy of the remedy at [illegible] consideration of the [illegible] quate and that it was [illegible]

In Stewart v. [illegible] said: "A defendant [illegible] on the overruling [illegible] of the whole case, [illegible] to the relief [illegible] point raised by the demurrer.

In [illegible] 380, at page 386, [illegible] existence of an [illegible] and if so, [illegible] matters [illegible] vantage of [illegible] murrer or not, [illegible] the court on the [illegible]

It is [illegible] does not state [illegible] not be sustained [illegible] in T. Leon, 55. [illegible] River R. R. Co., [illegible]

"The bill on its face [illegible] alleged in not [illegible] obtained by fraud [illegible] did not [illegible] We think this [illegible] Fitchorda v. [illegible] of which it is the [illegible] parties to a suit [illegible] to the subject matter [illegible] is fixed by the law [illegible] parties."

In the case [illegible]

exhaustion of legal remedies they would necessarily have to be proven. In this connection in the Toledo case last cited at page 632 the court said, "While it is true that a court of equity which has jurisdiction of a cause by reason of the existence of some ground of equitable jurisdiction, for the purpose of doing complete justice between the parties, may, in addition to the equitable relief, afford relief of a character which, in the first instance, is only obtainable in a suit at law, still, to authorize relief of the latter character, some special and substantial ground of equitable jurisdiction must be alleged in the bill, and proved upon the hearing. Mere statements in a bill upon which the chancery jurisdiction might be maintained, but which are not proved will not authorize a decree upon such parts of the bill, as, if standing alone, would not give the court jurisdiction. 12 Ency. of Pl. & Pr. p. 165; Daniel vs. Green, 42 Ill. 471; Logan v. Lucas, 59 Ill. 237; Gage v. Mayer, 117 Ill. 632; and County of Cook vs. Davis, 143 Ill. 151.

It was for appellee to allege and prove the inadequacy of its legal remedy, and not for appellant to allege and prove the adequacy thereof. In view of the fact that appellant demurred to the bill and of the rule as announced by the above authorities we are clearly of the opinion appellant did not waive his right to insist that appellee had not exhausted its remedy at law.

Furthermore in view of the return of the sheriff on the execution was appellee in a position to resort to a court of equity. The return on the execution must be the act of the sheriff on his responsibility and not by direction of plaintiff in the return unless after demand. The record discloses that the sheriff attempted to explain or deny his return. He attempted to explain his return by saying that he had made some investigation as to whether or not the judgment debtor had any property subject to execution. His explanation is vague and indefinite. He stated that he believed he had made a levy but the return and all the circumstances show that he made no levy. We have heretofore set out herein the return of the sheriff.

In order to entitle the complainant in a creditors' bill to a decree it must appear that he has exhausted his legal remedies by obtaining judgment, suing out execution, having the sheriff make proper efforts to collect the judgment by that means

and, such efforts proving unavailing, by having him return the execution unsatisfied. Scheubert vs Honel, 152 Ill. 313-315.

No presumption prevails in favor of the sheriff's return when the same is made by the direction of the plaintiff in the writ, or where, by the substance of the return, it cannot be seen that he was unable, in the discharge of his official duty, to find the property of the debtor. Pecos Company vs Olson, 63 Ill. App. 313-314.

In Hart vs Oliver, 296 Ill. 209, Hart filed a creditors' bill which contained the usual allegations and sought in particular to reach the interest of Albert J. Oliver in certain lands and premises. A judgment had been obtained and an execution issued and the sheriff made the following return thereon. "By virtue of the within execution to me directed, I caused the real estate levied upon as aforesaid to be advertised for sale according to law, and no bid having been received at sale for said real estate or any part thereof, I therefore return the within execution no part satisfied, this 11th day of February, A.D. 1908.

Christopher Strassheim, Sheriff.

By Henry Spears, Deputy."

The court in its opinion at page 213 said, "Our Chancery Act, Chapter 22, Sec. 49, provides that when ever an execution shall have been issued against the property of a defendant on a judgment and shall have been returned unsatisfied in whole or in part, the parties suing out such execution may file a bill in chancery against such defendant and any other person to compel the discovery of any property belonging to the defendant. A condition precedent to the filing of this bill is the proper return of the execution. The execution and its return must be broad enough to show that defendant has no personal property as well as no real property and must be such as if untrue would render the officer liable for a false return. Whatever the language used, the return must show that the defendant has no property of any character or kind out of which the execution can be satisfied. It must show prima facie that the creditor has exhausted his legal remedies thereby giving jurisdiction to a court of chancery." Can it be said that the return in this case complied with the rule as

and, such effects vacating [illegible] in the exe-
cution unmodified. [illegible]

The president [illegible]
turn over the [illegible]
the writ, [illegible]
seen that he [illegible]
find the property [illegible]
App. 312-313.

In [illegible]
bill under [illegible]
law to [illegible]
and proceeds.
issued [illegible]
virtue of [illegible]
estate [illegible]
to law, [illegible]
estate [illegible]
tion or [illegible]

By Act of [illegible], [illegible]
The [illegible]
Chapter 24, Sec. [illegible]
have been issued [illegible]
and shall [illegible]
parties [illegible]
against a [illegible]
covery of [illegible]
proceedings [illegible]
execution. [illegible]
also that [illegible]
property and [illegible]
title for [illegible]
true and [illegible]
or kind [illegible]
show and [illegible]
thereby [illegible]
said such the [illegible]

above announced? We think not.

In Hart vs Oliver, supra, at page 213 it was further said: "Our statute authorizing the filing of a creditor's bill does not introduce any new principles into the law but is declaratory of a well-recognized, pre-existing principle. A court of equity previously entertained creditor's bills but would not, before or since, lend its aid where there was an adequate remedy at law. It requires that the plaintiff in a judgment shall have made a bona fide attempt to collect his debt by execution against the property of the defendant."

In Pecos Company vs. Olson, 63 Ill. App. 313, a return was made on an execution by a sheriff as follows: "The within named defendant and no property of the within named defendant found in my County on which to levy this writ; I therefore return the same by order of plaintiff's attorney no property found and no part satisfied this 19th day of April 1895.

James Pease, Sheriff.

By James Sheridan, Deputy."

The return was made under the following direction, "The sheriff will return the within execution no property found and no part satisfied forthwith.

Newcomer & Dellenback.

April 19th, A.D. 1895."

It appears that Newcomer and Dellenback were the attorneys for the execution creditor. Relative to the return the court in its decision among other things held: "In order for a sheriff to return an execution before the day which limits its life so that a foundation may be laid for the prosecution of equitable remedies based upon an execution of legal remedies such return must show upon its face or by clear inference that it is his own act." We are of the opinion, therefore, that the return made by the sheriff in the instant case was not such as to show that appellee had exhausted all its legal remedies.

It is also argued by appellee that the bill is based upon Section 14 of the Uniform Stock Transfer Act as found in Section 429, Chapter 32, Smith-Hurd Illinois Revised Statutes, 1929. The Uniform Stock Transfer Act contains no provision granting relief to a creditor whose remedy at law appears to be adequate

and furnishes no authority for upsetting the firmly established rule of law that every creditor must exhaust his legal remedies before he is entitled to the extraordinary relief of a creditor's bill.

The Uniform Stock Transfer Act was adopted in 1917. It is entitled, "An act to make uniform the law of transfer of shares of stock in corporations." It had formerly been the law that a certificate of stock in a corporation was not the stock itself and that a levy on same should be made on the keeper of the stock books of the corporation. People vs Goss & Phillips Manufacturing Co., et al, 99 Ill. 355.

Section 13 of the Uniform Stock Transfer Act provides that no attachment or levy upon shares of stock for which a certificate was outstanding should be valid until the certificate was seized by the officer or surrendered to the corporation. Section 14 of the act provides for aid to creditors whose debtors own corporate stock from courts of law and equity in regard to property not readily to be reached by ordinary legal process.

We know of no construction that has been placed upon the Uniform Stock Transfer Act to cover the situation disclosed by the record in this cause. Appellee's claim consisted of notes capable of being reduced to judgment by virtue of the warrant of confession they contain. The books of appellee disclosed ownership of its stock by appellant. A judgment had been secured. Property on which a levy could be made was known to exist and yet no levy is shown by the record to have been made. It is true the Uniform Stock Transfer Act prevented the sheriff from making a levy on the secretary of the appellee itself and required him to seize the actual stock certificate. Yet the record shows no effort on his part to do so. It is also true that the same act entitled the bank to the aid of a law or equity court in regard to the property not readily reachable by ordinary process. However it does not appear that any effort was made to reach the property by ordinary legal process. Nor does it appear that having filed its bill in a court of equity and having secured a decree the bank has placed itself in any better position than that which it occupied as a common-law creditor and the holder of a judgment and execution. The decree simply provides for the payment of money by the appellant or in the alternative for the sale

and further in authority for [illegible] rule of law that every creditor must [illegible] before he is entitled to the extraordinary [illegible] bill.

The [illegible] is entitled, "An act to [illegible] of about in [illegible] certificate of [illegible] that a levy [illegible] book of the [illegible] Co., et al. 20 Ill. [illegible].

Section 1 [illegible] no attachment [illegible] was overreaching [illegible] by the officer or [illegible] not provided for [illegible] stock from courts [illegible] ily to be needed [illegible].

[illegible] Uniform [illegible] record in this [illegible] of being reduced [illegible] they contain. [illegible] by appellant. A [illegible] levy could be made [illegible] by the record in [illegible] Transfer Act [illegible] tory of the [illegible] certificate. [illegible] It is also [illegible] a law or [illegible] by ordinary [illegible] made to [illegible] appear that [illegible] secured [illegible] than that [illegible] of a judgment [illegible] payment of [illegible]

of the stock in question. No order restraining the transfer or incumbrance of the stock in question appears in the decree. No order is to be found in the decree requiring any act with reference to the stock by any of the parties defendant. Appellant is not ordered to turn over the twenty shares of stock which he owned free and clear of the pledged interest of the Central National Bank of Peoria. The decree leaves the bank, in so far as the relief granted is concerned, where it was at the time of the institution of the suit. It appears to us that the clear intent of the Legislature in passing the Uniform Stock Transfer Act was to protect corporations and innocent purchasers from the consequences of a discrepancy between record title, on the stock books of a corporation, to its stock, and any evidence which the actual possession or written assignment of the certificate itself might show.

It certainly was not the legislative intent to open a channel for equitable relief, by the adoption of the Uniform Stock Transfer Act, to any creditor whose debtor owned or was thought to own stock certificates. Section 14 of said act in question by its terms offers aid to creditors "in regard to property which cannot readily be reached or levied upon by ordinary legal process." This does not mean that a creditor can simply declare himself to come under this section without making any effort to reach the property in question by ordinary legal process.

It will be remembered that the bill of complaint alleges that the appellee was without remedy in the premises except in a court of equity. Having secured its decree what remedy did it thereby obtain that it did not have at law?

The Uniform Stock Transfer Act cannot be resorted to by appellee until it has placed itself in a position to show and does show that it has exhausted all its legal remedies as afforded by ordinary legal process.

We condlude therefore, that the decree of the Circuit Court of Woodford County should be reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, }ss.
SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____
Clerk of the Appellate Court

(88416—1M—5-28) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On AUG 20 1931 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8254 Agenda 46

L. A. FABRICK and H. B. MATHEWS, Appellees,	:	Appeal from the Circuit Court of Winnebago County.
vs.	:	
GUILFORD FARMERS' MUTUAL INSURANCE COMPANY of Winnebago County, Appellant,	:	

Jett, J.

The record discloses that L. A. Fabrick and H. B. Mathews, appellees, instituted this proceeding in the Circuit Court of Winnebago County against the Guilford Farmers' Mutual Insurance Company of Winnebago County, appellant, to recover upon two policies of insurance. A jury trial was had with a finding in favor of appellees in the sum of $3300 upon which judgment was rendered and this appeal by the appellant followed.

The declaration originally filed consisted of the common counts and subsequently an additional count was filed. The additional count set up the fact that the suit was based upon two fire insurance policies issued by the appellant upon two cottages built upon a lot owned jointly by appellees. The cottages were described in the respective policies as "South House" and "North House". The policies were dated October 21, 1927, and it was averred by the appellees that they had kept and performed all things in said policies contained on their part to be kept and performed; that from and after the date of the issuance of the policies they had an interest in the respective cottages to the amount of loss as averred; that on or about March 23rd, 1928, the south house was completely destroyed by a fire and that the appellees thereby suffered a loss in the full amount of the policy covering that particular cottage, namely, $3000; that on or about the 24th of March, 1928, the north house was damaged by fire resulting in a loss to appellees in the sum of $1000.

The appellant demurred to the declaration. The demurrer

Gen. No. [illegible]

L. A. [illegible] MATHEWS,	:
Appellee,	:
vs.	:
GUILDAND [illegible] INSURANCE [illegible] Winnebago County	:
Appellant.	:

Jett, J.

The [illegible]

Mathews, [illegible]

Court of [illegible]

Insurance [illegible]

two policies [illegible]

in favor of [illegible]

rendered [illegible]

In [illegible]

common counts [illegible]

additional [illegible]

fire insurance [illegible]

built up [illegible]

described in [illegible]

Home". The [illegible]

averred by the [illegible]

in said policies [illegible]

that from and after [illegible]

had an interest [illegible]

averred; [illegible]

pletely destroyed [illegible]

a loss in the [illegible]

cottage, [illegible]; [illegible]

the north [illegible]

in the [illegible].

The [illegible]

was overruled. To the declaration appellant pleaded the general issue together with special pleas. The special pleas were withdrawn and a stipulation was entered into to the effect that all testimony or evidence admissible under any special plea or replication might be admitted or received under the plea of the general issue.

It appears that L. A. Fabrick and H. B. Mathews, appellees, were the owners of certain real estate located on what is called Springfield Avenue a street outside the western city limits of Rockford; that the lot was improved with the two cottages in question; that after starting the improvements appellees applied to one Fred H. Smith for a loan of $1500 on each proposed cottage in order to proceed with the construction of the buildings thereon; that in October 1927, Smith went ~~under~~ upon the premises and subsequently made the loans taking back a mortgage in the sum of $1500 upon each of the cottages; that insurance was applied for upon each of the cottages; that W. H. Conklin, secretary of the appellant company, went upon the premises and viewed the same; that the frame work and roof of the north house were up and but little more than the foundation of the south house had been constructed; that Conklin made direct inquiry regarding the cost of each house when completed and he contends Fabrick, one of the appellees, replied that the cost of each house would be $4500; that the appellees asked for $3000 insurance upon each house and made application therefor. The applications for insurance were accepted and the insurance policies were issued. Each policy was for the sum of $3000 and contained a clause that the loss, if any, was payable to Fred H. Smith, mortgagee. There was a clause also in each of the applications that the insurance was not to be in force in full until the houses were completed. The evidence shows that the work proceeded upon the houses during the fall and winter of 1927; that the painting was finished on the south house in March 1928; that with the exception of certain plumbing and furnace fixtures the south cottage was, on March 23rd, 1928, substantially completed; that the north house was completed with the exception of interior painting, plumbing and furnace fixtures on the 23rd of March 1928; that the cottages were insured and damaged as charged in the declaration and that they had not been occupied at the time the damage by fire was occasioned.

On the trial of the case the appellant relied upon the following defenses. That appellees, at the time of the signing of the applications for insurance in response to the inquiries of the agent of the appellant regarding the cost of the respective cottages when same should be completed, stated to the agent that the cost of each cottage upon completion would be $4500; that the respective policies was thereupon in good faith issued by the appellant based upon the valuation as stated to the agent; that the actual cost of the buildings and each of them was between $2000 and $2500; that the statements made to the agent of the appellant by appellees constituted a misrepresentation of a fact material to the risk rendering the policies, and each of them, void; that the losses charged and each of them occurred as a result of incendiary fires caused by the assured or some of them; that appellees or some of them entered into conspiracy with intent to fire the cottages in question for the purpose of collecting the insurance thereon.

Seventeen assignments of error are made and argued. It is first argued that the verdict of the jury is contrary to the law and the evidence and is excessive. From an examination of the policies in question it will be found that they are silent in regard to an over-valuation of the property insured, and such being the case it was for the jury to find from the evidence the amount of damage appellees sustained which they did and fixed the same at $3300. The record discloses that Sidney Cain testified that he was a contractor and was requested by both parties to estimate the loss; that he fixed the replacement value of the south house at $3850 and the cost of repairing the north house at $415. The said witness testified that in the latter part of March or fore part of April he had a talk with Conklin, secretary of the appellant company, and Conklin asked him to go over and estimate the damage and cost of repairs and give him a price on it. In reply to the question as to what Conklin said when he returned after having examined the premises was, that the amount was satisfactory and that before he could authorize me (Cain) to go ahead with the repair work he would have to have a clearance of some sort from Kiraine the State Fire Marshal because he had been ordered not to pay the insurance until the matter was investigated but to take it up with Mr. and Mrs. Fabrick and probably when the work was done the whole thing would be ready for

On the trial of the case the [illegible] following defences. First generally, that [illegible] the applications for licences [illegible] agent of the appellant regarding the [illegible] when sales should be completed, should [illegible] each cottage [illegible] policies was the [illegible] upon the validity [illegible] the buildings and [illegible] statements made [illegible] misrepresentation [illegible] policies, and some of them [illegible] of them concerned a [illegible] or some of them [illegible] spiracy with [illegible] of collecting the [illegible]

[illegible]

is first argued that [illegible] and the evidence [illegible] policies in question [illegible] to an over-valuation [illegible] it was for the jury [illegible] appellees contended [illegible] record disclosed [illegible] and was remanded [illegible] fixed the replacement [illegible] of repairing the [illegible] that in the latter [illegible] with Conklin, acting [illegible] him to go over and [illegible] him a price on it. [illegible] said when he returned [illegible] the amount was [illegible] (Cain) to go about [illegible] clearance of some [illegible] he had been ordered [illegible] investigated but to take it up with [illegible] Conklin and [illegible] when the [illegible]

settlement.

A witness by the name of Ruddicombe for appellees testified that the fair cash market value of the south house at the time it was destroyed was $4200 but that he included a contractor's profit of $500.

The testimony on the part of the appellants was to the effect that the values were much less than those placed thereon by the witnesses for appellees. The evidence was conflicting bearing upon the question of loss and damage sustained. Since the jury saw and heard the witness and having assessed damages, in view of the state of the record, we are not prepared to say that the verdict was contrary to the law and the evidence or that it was excessive.

It is next urged that the court committed reversible error in allowing witnesses for appellees to testify over the objection of appellant in valuing the south house at the time of its destruction as the fair cash market value of the property in question and not the actual cash value thereof. The record shows there is evidence as to the actual cash value on which to base the finding. On examination it will be found that the policies in question provided that in case of a total loss of buildings the full amount of insurance would be paid. Under the terms of the policies the values fixed by the several witnesses on the south house had to do entirely with the amount of insurance that should have been written on it in the first instance, a matter that was fixed by the secretary of the company when he inspected the buildings, before writing the policies in question.

We have gone through the record with a view of examining what it discloses bearing on the contention of the improper admission of evidence and are ofthe opinion we would not be justified in reversing the cause on the grounds of the admission of improper evidence.

It is also argued that certain evidence offered by the appellant was improperly excluded. This objection is based upon the offered testimony of one Bert Cheney, a witness for appellant as to statements made by Clarence Mathews in a conversation regarding a missing can of benzine the morning after the destruction of the south house, which was excluded. It is also argued that the testimony of Michael Delehanty who also had a conversation with the said Clarence Mathews was improperly excluded. Clarence Mathews was not a party

settlement.

A witness [illegible]

that the trial court [illegible]

was destroyed [illegible]

of $300.

The lower [illegible]

that the [illegible]

for speculative. [illegible]

of loss and [illegible]

and having [illegible]

are not [illegible]

the evidence [illegible]

It is [illegible]

in allowing [illegible]

appellant is [illegible]

as the trial [illegible]

actual cash [illegible]

the normal [illegible]

it will be [illegible]

of a total loss [illegible]

said. Under [illegible]

witnesses [illegible]

insurance [illegible]

a matter [illegible]

accepted the [illegible]

[illegible]

that it is [illegible]

of evidence [illegible]

ing the [illegible]

It is [illegible]

appellant [illegible]

offered [illegible]

determine [illegible]

[illegible]

house, which was [illegible]. It [illegible]

Mutual Building [illegible]

[illegible] was [illegible]

to the suit and any statement made by him to Bert Cheney or Michael Delehanty would not have been binding on appellees and the same was properly excluded by the court.

It is insisted that the argument to the jury by counsel for appellees was improper and prejudicial. It will be remembered that the defenses relied upon were fraud and misrepresentation on the part of appellees; that the loss occurred as a result of incendiary fire caused by the design of the assured, and that appellees , or one of them, entered into a conspiracy to fire the buildings in question and collect the insurance thereon. It appears that no objection was made to the remark of counsel until the attention of the jury was called to the fact that the girls in appellant's office were not brought in to testify as to what actually occurred when the applications for the policies in question were signed by appellees, and when their attention was called to the fact that by innuendo L. A. Fabrick, the last man to leave the last cottage damaged, was guilty of incendiarism, a crime against the laws of the State of Illinois. We are not prepared to say that the argument calling attention to the failure of the appellant to produce the clerks in his own office was improper and constituted reversible error. Since appellant relied upon the defense that appellees were instrumental in bringing about the fire that resulted in the loss, it certainly can not be said appellees would not have a right to comment upon such charge of incendiarism when the same had been directly charged against them by the appellant.

It is also insisted that the court erred in limiting the cross-examination of appellee Fabrick. An effort was made by the attorney representing appellant on cross-examination to put a question to appellee Fabrick, inquiring of him whether or not he had told Bert Cheney that, "it would be a good thing if the damn places did burn up." (Claiming that this remark was made by Fabrick on the night of the fire) Attorney for appellees remembered that on a former trial of the case a similar question had been put to Cheney. The jury was sent out and the attorney for appellant said to the Court: "I propose to ask this witness if he did not state to Bert Cheney in the course of his conversation on the 23rd of March, the day the first of the two fires occurred or the day before the first

to the exit and may [illegible]
Defendant would not have [illegible]
properly evaded [illegible]

It is [illegible]
for appellees was [illegible]
that the defendant [illegible]
the part of appellees;
contrary fire [illegible]
or one of them, [illegible]
question and called [illegible]
was made to the [illegible]
called to the [illegible]
brought in to testify [illegible]
actions for the collision [illegible]
when their [illegible]
A. Fabrick, who [illegible]
guilty of [illegible]
Illinois. [illegible]
attention to the failure of [illegible]
his own office [illegible]
appellant relied [illegible]
in bringing [illegible]
can not be said [illegible]
such charge [illegible]
against them [illegible]

It is [illegible]
cross-examination [illegible]
attorney [illegible]
tion to appellee [illegible]
told Fort [illegible]
did [illegible] up." [illegible]
night of the fire [illegible]
former trial [illegible]
The jury was [illegible]
Court: "I [illegible]
Cheney is the [illegible]
day the first of [illegible]

two fires occurred, 'that it would be a good thing if the damn places did burn up.'"

Attorney for appellees: Now, the wicked part of that question is that the question was asked of Bert Cheney at the last trial if he didn't say that and Cheney said he didn't or that nothing of that kind happened.

Attorney for appellant: Well, that was another law suit and Bert Cheney will be here to testify.

The Court: I am not going to allow that. I remember Bert Cheney saying that he did not remember those words. It would be ridiculous and you ought not to ask the question.

We think the court was right in sustaining the objection to the question. It would tend to prejudice the jury against appellees and it was not cross-examination of any conversation that had been gone into by appellees on direct examination. Furthermore the court had in mind what was said by Cheney on the former trial and evidently was of the opinion that the question as suggested could have but the one effect.

It is also contended by the appellant that the court erred in giving instructions four, six, seven, eight and nine on the part of appellees. We have examined these instructions and each of them and in giving them we are of the opinion that the court did not commit reversible error. The record shows that the court fully instructed the jury on behalf of the appellant on appellant's theory of the case and in view of the instructions given on the part of the appellant we are clearly of the opinion that the appellant is not in a position to offer any serious objection to the instructions.

Relative to the contention of the appellant that the appellees were in a conspiracy to destroy the building we desire to say that we have examined all of the evidence bearing upon that question and the evidence is not of that character and weight that would warrant us in reversing the judgment for that reason.

The contention of the appellant that the verdict of the jury is the result of prejudice and passion is not well taken and the record does not sustain appellant therein. The court did not err in refusing to direct a verdict in favor of the appellant at the close of appellee's evidence nor at the close of all of the evidence.

two fires occurred. [illegible]
did burn up."

Attorney [illegible]:

Is that the [illegible]

Just that it [illegible]

Did's on [illegible]

Attorney [illegible]:

[illegible]

The Court: [illegible]

[illegible]

[illegible]

[illegible]

to the [illegible]

and it was [illegible]

gone into [illegible]

had in [illegible]

was of the [illegible]

the one [illegible].

[illegible]

in giving [illegible]

of modelled. [illegible]

and in giving [illegible]

commit re[illegible]

attributed [illegible]

of the [illegible]

the appellant [illegible]

in a [illegible]

[illegible]

were [illegible]

we have [illegible]

the end [illegible]

me in [illegible]

[illegible]

jury [illegible]

the court [illegible]

our in [illegible]

the close [illegible]

evidence.

In view of the great number of errors assigned we have carefully gone through this record and we are of the opinion that the appellant has failed to point out any reason for the reversal of the judgment. The judgment, therefore, of the Circuit Court of Winnebago County will be affirmed, which is accordingly done.

Judgment affirmed.

In view of the great number [illegible] carefully gone through this record and [illegible] that the appellant has failed to point out [illegible] the judgment. The judgment, therefore, [illegible] Winnebago County will be affirmed, which is [illegible] judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____
Clerk of the Appellate Court

(88416—1M—5-28) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On AUG 1931 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8280 Agenda No. 28

In the Appellate Court
of Illinois
Second District
October Term, A. D. 1930

Fred E. Gardner,
Appellant,
vs.
Claude E. Clark,
Appellee,

Appeal from the Circuit Court of
Winnebago County.

Jett, J.

The record discloses that at the July Term 1928, of the Circuit Court of Winnebago County, an action of trespass to recover damages was instituted by Fred E. Gardner, plaintiff, against Claude E. Clark, defendant.

The declaration filed by the plaintiff consists of three counts. In the first it is averred that the defendant, who was vice-president of Toombs & Daily Company, an Illinois corporation, in consideration that the plaintiff buy, of or through the defendant certain shares of the Common Capital Class "A" stock of the said Toombs & Daily Company at a price of Thirty Dollars per share, promised and represented to the plaintiff that the said company was doing a large and remunerative business, was in excellent financial condition and clearing in excess of 10% per year profits, and that the plaintiff would receive dividends on any money invested equalling 8% annually, and that the plaintiff, conferring and relying on said promises and representations of the defendant, bought on September 3, 1926, one hundred and fifty shares of the Common Capital Class "A" stock of said Toombs & Daily Company paying therefor the sum of $4500.00; that the defendant deceived and defrauded the plaintiff in that said company was not at that time doing a large and remunerative business and was not clearing in excess of 10% a year profits and was in no position to pay to the plaintiff a sum equalling 8% annually on the money which the plaintiff, as a result of the statements and promises

Gen. No. 8830

In the Appellate Court

of Illinois

second District

October Term, [illegible]

Fred L. Gardner,

Appellee,

vs.

Glenn M. [illegible],

Appellee.

Jett, J.

The record discl[illegible]

Circuit Court of [illegible]

damages was instituted [illegible]

E. Clark, [illegible].

[illegible]

county. [illegible]

president of [illegible]

alleration [illegible]

share of the [illegible]

Daily Company [illegible]

represented [illegible]

and remuneration [illegible]

clearing [illegible]

would [illegible]

and that the [illegible]

representations [illegible]

hundred and fifty [illegible]

and Tooths [illegible]

that the defendant [illegible]

company was [illegible]

and was not [illegible]

position to pay to [illegible]

money which the [illegible]

made by the defendant, might invest but, on the contrary said corporation had been insolvent for a period of six months and had been and was at that time doing business at a loss, all of which the defendant well knew at the time of making said representations, statements and promises to the plaintiff whereby said shares of said common and capital stock in said company purchased by the plaintiff became and were of no value to him.

The second count in effect contains the same averments except that it avers that the plaintiff bought three hundred shares of the Common and Capital Class "A" stock of said company amounting to the sum of $9,000.00 on December 7, 1926, and that for a period of nine months previous to said sale the defendant knew that the representations, statements and promises made by him to the plaintiff in relation to the value of said stock and the business of the corporation were untrue and fraudulent.

In the third it is averred that the plaintiff bought fifty shares of the Common Capital Class "A" stock of said company amounting to $1500.00 on February 3, 1928, and that for a period of twenty-one months previous to the said sale the defendant knew that the representations, statements and promises made by him to the plaintiff in relation to the value of said stock and the business of the corporation were untrue and fraudulent, to damages of the plaintiff of $15,000.00.

On September 4, 1928, an affidavit for attachment was filed in the office of the clerk of the Circuit Court of Winnebago County in aid to the action of trespass brought by the plaintiff against the defendant. The affidavit in attachment was in the usual form and set forth that within two years last past the defendant fraudulently conveyed or assigned his effects or a part thereof so as to hinder or delay his creditors and has within two years last past fraudulently concealed or disposed of his property so as to hinder or delay his creditors and is about fraudulently to conceal, assign or otherwise dispose of his property or effects so as to hinder and delay his creditors; that on August 14, 1928, said defendant conveyed certain property (described in said affidavit) in the City of Rockford, Winnebago County, Illinois, without consideration, to one Seymour N.

made by the defendants, [illegible]
ation had been [illegible]
was at that time [illegible]
well improv[illegible]
promises [illegible]
stock in said corpora[illegible]
value to him.

The record [illegible]
cept that it appears [illegible]
of the Common and [illegible]
to the sum of $[illegible]
nine months previous [illegible]
remarketing, [illegible]
relation to the value [illegible]
ation were matters [illegible]

In the third [illegible]
shares of the Common [illegible]
to $1800.00 on February [illegible]
months previous to [illegible]
tions, attorneys [illegible]
to the value of [illegible]
tire and [illegible]

On September [illegible]
filed in the office of [illegible]
County in aid of the [illegible]
against the defendants [illegible]
form and set forth [illegible]
mishly converted [illegible]
hinder or defraud [illegible]
fraudulently conceal [illegible]
delay his creditors [illegible]
otherwise dispose of [illegible]
his creditors; that [illegible]
certain property (described [illegible]
Winnebago County, Illinois, [illegible]

Cohen of Chicago, Illinois, which deed is void and should be set aside; and that on the same day, to-wit, August 14th, 1928, said defendant made and executed to the Chicago Title and Trust Company of Chicago, Illinois, a mortgage or trust deed on said described property in the City of Rockford, Winnebago County, Illinois, in the amount of $20,000 and that said mortgage or trust deed was without consideration, is void and should be set aside and the title to the said property should be declared to be in Claude E. Clark free and clear of the above described deed and mortgage.

The defendant filed a plea traversing the allegations of the affidavit. Issue was joined, the cause was heard by the court, a finding in favor of the defendant and the attachment proceedings were quashed. The plaintiff prosecutes this appeal.

The evidence shows that prior to August 1, 1928, the defendant Clarke was vice-president of Toombs & Daily Company. Between that day and August 15, 1928, a receiver for the company was appointed. The evidence tends to show that there were rumors of a possible criminal proceeding against the officers of the said Toombs & Daily company. The defendant went to Chicago and conferred with an attorney by the name of Seymour N. Cohen; he contemplated employing Cohen to represent him in the criminal proceeding if any such was instituted. Cohen suggested to the defendant that he convey to him, Cohen, the property here involved which is located in Winnebago County. The defendant stated that the property was worth around $16,000 above the mortgage encumbrance then on it and that he might need the same. On August 4, 1928, the defendant executed a trust deed to the Chicago Title and Trust Company securing notes payable to the order of himself in the sum of $20,000. This trust deed was filed for record and on the same day the defendant conveyed said property by warranty deed subject to the said trust deed to Cohen. The record discloses that the Chicago Title and Trust Company was never advised of the making of said trust deed and the notes purporting to be secured by it were never negotiated by the defendant and at the time of the conveyance to Cohen the defendant did not owe him anything unless it would be the matter of a consultation fee for the consultation occurring at the time the matter of the conveyance was discussed.

Cohen of Chicago, Illinois, did lend to [illegible]
and that on the same day, to-wit, [illegible] 1918, said [illegible]
made and executed to the Chicago Title and Trust Company, [illegible]
Illinois, a mortgage on trust deed on said [illegible]
City of Rockford, Winnebago County, Illinois, [illegible]
and that said mortgage or trust deed [illegible]
void and should be set aside [illegible]
be declared to be in default [illegible]
ended deed and mortgage.

The interveners filed [illegible]
affidavit. Leave was taken [illegible]
a finding in favor of the [illegible]
were quashed. The chancellor [illegible]

The evidence [illegible]
and Clarke was vice-president [illegible]
that day and [illegible] 1918, [illegible]
The evidence tends to show [illegible]
criminal proceeding [illegible]
Daily company. [illegible]
an attorney by the name of [illegible]
ing Cohen in negotiating [illegible]
instituted. Cohen [illegible]
Cohen, the property [illegible]
The defendant [illegible]
the mortgage [illegible]
On August [illegible], 1918, [illegible]
Title and Trust Company [illegible]
in the sum of $80,000. [illegible]
the same by the [illegible]
subject to the [illegible]
the Chicago Title [illegible]
of said trust deed [illegible]
never negotiated by [illegible]
to Cohen the defendant [illegible]
the matter of a [illegible]
the time the matter of [illegible]

The record further discloses that on September 4, 1928, the date of the filing of the affidavit for attachment, a deed from Cohen back to the defendant was filed for record. The record fails to show whether or not the deed was filed before the affidavit for attachment was filed.

The question involved in this appeal is whether under the facts and circumstances as disclosed by the record the defendant within two years prior to September 4, 1928, fraudulently conveyed or assigned his effects or a part thereof so as to hinder or delay his creditors and has within two years last past fraudulently concealed or disposed of his property so as to hinder or delay his creditors and is about fraudulently to conceal, assign or otherwise dispose of his property or effects so as to hinder or delay his creditors as alleged in the plaintiff's affidavit for attachment in aid of the suit filed by the plaintiff in trespass for damages.

The question as to whether the defendant was guilty of making, executing and delivering a fraudulent conveyance of his property need not necessarily be proven by direct evidence of witnesses speaking from personal knowledge of the alleged fraudulent intent.

Where fraud exists it must be generally proven by such facts and circumstances as to justify the court or jury in inferring a fraudulent intent or motive. The question is whether the facts proven justify such inference.

The uncontradicted testimony is that the defendant owned certain improved real estate in Winnebago County worth considerable in excess of the bona fide first mortgage against it in the sum of $16,000, and although he owed his attorney nothing on August 14, 1928, he and his wife joined in a conveyance of this property to his said attorney reciting therein a consideration which was never paid, the object of the conveyance being to secure the attorney for contemplated legal services which were never performed; that the trust deed and note which were made and executed on August 14, 1928, and placed on record in Winnebago County on the following day were made and executed without the knowledge of the said Chicago Title and Trust company; and that the Chicago Title and Trust Company was not notified of the

The record further [illegible]
date of the filing of the [illegible]
back to the bottom [illegible]
whether or not the mood [illegible]
was filed.

The question involved [illegible]
facts and circumstances [illegible]
in two years prior to [illegible]
assigned his effects [illegible]
creditors and has [illegible]
or disposed of his [illegible]
and is about [illegible]
his property or effects [illegible]
alleged in the [illegible]
suit filed by the plaintiff [illegible]

The question [illegible]
making, concerning [illegible]
erty need not necessarily [illegible]
speaking from [illegible]

Where fraud exists [illegible]
and circumstances [illegible]
fraudulent intent or [illegible]
proven justify such [illegible]

The [illegible]
certain improved real [illegible]
in excess of the [illegible]
$16,000, and [illegible]
he and his wife [illegible]
attorney building [illegible]
object of the [illegible]
legal services [illegible]
note which [illegible]
record in Lincoln [illegible]
without the knowledge of the [illegible]
and that the Chicago [illegible]

existence of the trust deed and mortgage. The effect of the testimony of the defendant was that following the drawing of the trust deed and note neither of the instruments were hypothecated nor used as security for any purpose whatever. When asked why he had not caused this $20,000 trust deed to be released of record since August 15, 1928, the reply of the defendant was, "Well, I don't know, just never occurred to me," and that he "Just held it in case I would need it and I haven't had any occasion so far to use it." So far as the record discloses this instrument has not been released and is an encumbrance against the property in question.

"Fraud may be inferred from proof of facts and circumstances which are so strong as to produce conviction of the truth of the charge, although some doubt may remain. Where fraud is alleged, and proof is offered to raise an inference thereof, the fact that no explanation of the transactions is offered by the party charged is an additional circumstance to be considered and from which inferences may be drawn." Schumacher v. Bell, 164 Ill. 181.

"While fraud is not to be presumed, yet it may be established by inference from facts and circumstances proven, without requiring positive direct proof; and when the conclusion necessarily results that a conveyance was made with such fraudulent intent to defraud, hinder or delay creditors, it can make no difference that with such purpose existing there were combined other motives at the time of making it. The testimony of the parties to the transaction that there was no fraudulent intent, and the conveyances were made in good faith, can not prevail against facts and circumstances which satisfactorily show the conveyances were fraudulent as to creditors." Phillips vs. Kesterson, 154 Ill. 572 at 574.

"While fraud cannot be presumed, yet it may be inferred from facts and circumstances shown and inferences deducible therefrom, based upon the probabilities of human conduct." Fabian v. Traeger, 215 Ill. 220.

"While fraud is not to be presumed, yet it may be inferred from facts and circumstances shown and inferences deducible therefrom, based upon the probabilities of human conduct. A court or jury is not bound to accept testimony of witnesses as true merely because

[illegible]

there is no direct testimony contradicting it, if it contains such inherent probabilities or contradictions as alone, or in connection with other circumstances in evidence, satisfy them of its falsity." Podolski v. Stone, 186 Ill. 540.

"While a debtor may prefer a creditor or creditors and such preference is valid notwithstanding the claims of other creditors, provided the debt preferred is actual and the property transferred does not clearly exceed the amount of the claim and the transaction is not a mere device to secure an advantage to the debtor to hinder, delay or defraud other creditors, yet such intent to defraud or to secure by such transfer an advantage to the debtor making it may be implied from the relationship of the parties taken in connection with other circumstances proved. There may be circumstances attending conveyances and transfers to hinder, delay and defraud creditors, which are in law denominated 'badges of fraud'. They do not in themselves constitute fraud, but are rather signs or indicia from which the existence of fraud may be properly inferred as a matter of evidence. Badges of fraud are not conclusive, but are strong or weak, according to their number and concurrance in the same case. They may be overcome by evidence establishing the bona fides of the transaction. Whether badges of fraud shown in the evidence are sufficient to establish the fact that the conveyance in question was fraudulent is a matter for the jury to decide. Fraud will not be presumed but must be proved. ~~xxxxxxxxxxxx~~ Proof of it may be either direct or circumstantial. Agreements to perpetuate fraud are not made in the open -- they are secret arrangements. As a result it frequently occurs that while fraud cannot be shown by direct evidence, yet it may be shown by proof of facts and circumstances from which the jury may rightfully infer the existence of the fraud charged. If a consideration of all the circumstances justifies the conclusion that the transaction was fraudulent, the jury are warranted in finding that the fraud exists though there be no direct evidence." Zwick v. Catavenis, 331 Ill. 240 at 247, 248.

We conclude that the facts and circumstances are sufficient to disclose a fraudulent intent on the part of the defendant to hinder

there is no [illegible]
inherent probability [illegible]
with other circumstances [illegible]
Podolski v. [illegible], [illegible] [illegible].

While [illegible]
preference in [illegible]
provided [illegible]
does not [illegible]
is not a mere device [illegible]
hinder, delay [illegible]
defraud or [illegible]
it may lo implies [illegible]
motion will [illegible]
attending [illegible]
creditors, [illegible]
not in [illegible]
from which [illegible]
of evidence. [illegible]
weak, [illegible]
may be [illegible]
action. [illegible]
to establish [illegible]
is a [illegible]
must be proved. [illegible]
or circumstantial. [illegible]
the open -- [illegible]
occurs [illegible]
may be [illegible]
may rightfully [illegible]
consideration [illegible]
the [illegible]
that [illegible]
Gatravenis, [illegible] [illegible].

and delay his creditors and that the court erred in quashing the attachment proceedings.

The judgment of the Circuit Court of Winnebago County is reversed and the cause is remanded.

Reversed and remanded.

and delay his creditors and that the court erred in granting the attachment proceedings.

The judgment of the Hearty Dist ct [illegible] is reversed and the cause is remanded.

Reversed and remanded.

STATE OF ILLINOIS, }ss.
SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____
Clerk of the Appellate Court

(88416—1M—5-28) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On AUG 29 1931 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Arthur R. Brinkworth, Surviving
Partner, etc.,

Appellee,

vs.

Charles J. Rohe,

Appellant,

Appeal from the Circuit Court
of Will County.

Jones, P.J:

Plaintiff, Arthur R. Brinkworth, as surviving partner of the firm of Brinkworth & Porche, recovered a judgment in the sum of $3,000 against Charles J. Rohe, defendant, in an action for damages alleged to have been sustained because of the shutting off of a supply of water to plaintiff's bottling works with alleged consequences of loss of plaintiff's business. This appeal is prosecuted from that judgment. The suit was instituted by Brinkworth and Joseph Porche as a co-partnership, doing business under the name of Crete Bottling Works. Porche died before the trial and the cause proceeded with Brinkworth, surviving partner, as plaintiff.

The declaration consists of two counts. The first count avers that defendant, on May 21, 1926, owned a certain building in the Village of Crete in Will County and on that day leased the same to plaintiffs for one year, for which plaintiffs were to pay $25 a month as rent; that plaintiffs took possession and prepared the building for a bottling works; that in making pop and soft drinks, large quantities of water were necessary and that under the lease, defendant agreed to furnish such water; that on September 6th, defendant unlawfully and in violation of the terms of the lease, cut off, or caused to be cut off, the water supply to said building from the mains of said village; and that thereby the business of plaintiffs was totally destroyed.

The second count is identical with the first, except

that it charges that defendant unlawfully, wilfully, and maliciously, with a premeditated intent and design to injure and destroy plaintiffs' business, cut off or caused to be cut off the said water supply. The only plea filed was that of the general issue. A number of reasons are urged for a reversal of the judgment.

The record shows that defendant permitted plaintiffs to secure a water supply for their business from the Village of Crete by connecting with the water pipes which ran under his building, occupied in part by his residence and also by his drug store. After plaintiffs' business had been in operation a few months, defendant shut off the water supply to the leased premises.

Plaintiffs' theory of the case is that the leasing was for one year at $25 a month; that by the lease and as a part thereof, defendant agreed to furnish plaintiffs with a supply of water for conducting their business; that after ascertaining that the business was profitable, defendant demanded $30 a month rent, which was agreed to and paid for two months; and that defendant later demanded $50 a month and shut off the water in order to force plaintiff to submit to his demand. The testimony of plaintiff and several witnesses tends to show that defendant demanded higher rent from the plaintiffs. Defendant's contention is that the leasing was from month to month at a rental of $25 per month, which was by agreement later increased to $30 a month on account of plaintiffs' using more floor space than originally contemplated; that he did not agree to furnish the supply of water, but that after the terms of the lease were agreed upon, he allowed them to connect with his water supply; that they agreed to pay all water bills in excess of his average semi-annual bill of $6. 0; and that

that in [illegible] [illegible]
malicious[illegible] [illegible]
and destroy [illegible]
out of the [illegible]
that of [illegible]
for a [illegible]

[illegible]
to secure [illegible]
of [illegible]
under [illegible]
also [illegible]
been in [illegible]
water [illegible]

[illegible]
him was [illegible]
as a [illegible]
with a [illegible]
after [illegible]
and [illegible]
for [illegible]
month and [illegible]
[illegible]
al [illegible]
rent from the [illegible]
the [illegible]
month, [illegible]
month or [illegible]
originally [illegible]
the [illegible]
[illegible]
[illegible]
[illegible]

he turned off the water on account of noise in the pipe through his building caused by the operation of plaintiff's business. The testimony is voluminous and in conflict.

A large number of objections are urged against the sixth instruction given on behalf of plaintiff. The first sentence of the instruction told the jury that "the landlord has no right by any act of his to interfere with the full enjoyment of the tenant of the premises leased, and in this case, if the jury believes from the evidence" that defendant without leave or right from plaintiff, purposely and unlawfully caused the water to be cut off as charged in the declaration, resulting in injury to the property or business of plaintiff, the jury should find the defendant guilty and assess the damages at such sum as the jury may believe from the evidence he has sustained. It omitted any reference to the question of whether or not defendant agreed to furnish a supply of water and his alleged justification in shutting off the same. It was therefore erroneous. (Hanusick v. Hanlon, 258 Ill. App. 114.) But the 14th instruction given on behalf of defendant was equally erroneous. It told the jury that if after defendant shut off the supply of water, plaintiff made no attempt to secure another supply, he cannot recover for any resultant loss to his business, even if he sustained such loss. Like the 6th instruction, it ignored the question of the alleged agreement to furnish plaintiff with a supply of water, and also omitted any reference to plaintiff's contention that defendant shut off the water in order to force him to submit to a demand for higher rent. It gave the jury a direction as to the kind of a verdict to render and must therefore be considered as directing a verdict. (Mitchell v. C.I.P.S. Co. 231 Ill. App. 405; I.C.R.R. Co. v. Smith, 208 Ill. 608; Pardridge v. Cutler,

168 Ill. 504. Defendant is not therefore in a position to complain of the same error committed by him. (Fleming v. E. J. & E. Ry. Co., 275 Ill. 486; Brennan v. C. & C. Coal Co., 241 Ill. 610; Harding v. St. Louis Stockyards, 242 Ill. 444.

The instruction refers the jury to the declaration, but it also sets out the elements of plaintiff's case and the impropriety of such reference is not as serious as in a number of cases where the practice of calling the jury's attention to the pleadings has been criticised. Such practice has been frequently condemned, but has not been held to be reversible error. Krieger v. A.E.& C. R. R. Co., 242 Ill. 544). It is not subject to the criticism that it fails to limit the damages to those alleged in the declaration.

The first clause of the instruction standing alone as an abstract proposition of law is subject to qualification, but the language following the first clause, in effect, limits the application of the general proposition to the alleged interference by shutting off the water. No other interference was in evidence or in issue, and the jury could not have been misled by the abstract statement. Practically the same objections are urged to the 7th instruction given on behalf of plaintiff. What is here said also applies to those objections.

There was no serious error in the omission to define certain words and phrases in the 6th and 7th instructions. The words "purposely and unlawfully" and "wrongfully" need no definition to one of ordinary intelligence. The phrase "wantonly and maliciously" is followed by the words "with a design to injure the plaintiffs' business" and the words "actual damages" are distinguished from exemplary or punitive damages as punishment.

Defendant offered, but the court refused to give, three instructions dealing with the question of defendant's alleged justification in shutting off the water, because of noises in the water pipe under his building, caused by the operation of plaintiffs' plant. The only plea filed was the plea of not guilty, which is the general issue in actions on the case. Under that plea, the defendant may not only put the plaintiff upon proof of the whole charge contained in the declaration, but may also give in evidence any justification or excuse. (Champaign v. McMurray, 76 Ill. 353; C. H. & D. R. R. Co. v. Goodson, 101 Ill. App. 123.) Justification being a proper issue under a plea of not guilty, instructions on that question, if otherwise correct, should be given when requested. While the instructions raised the question of justification, that is the only matter which they embrace. They entirely ignore plaintiff's theory of the case, and each of them either directs or amounts to directing a verdict. The court therefore did not err in refusing to give them.

Instruction No. 23 requested by defendant informed the jury that if the evidence concerning the terms of the lease preponderates even slightly in favor of the defendant or is evenly balanced, plaintiff cannot recover. The use of the adjectives "slight" or "clear" with reference to preponderance has been frequently criticised by the courts of this state. (Molloy v. Chicago Rapid Transit Co., 335 Ill. 164; Riddle v. Mansager, 254 Ill. App. 68). There was no error in refusing to give the instruction. The 24th and 25th instructions offered by defendant told the jury, in substance, that the act of defendant in shutting off the water was not an eviction unless they found that he had under the terms of the lease agreed to furnish such supply of water for the use of plaintiff in his business. Even if plaintiff was under the terms of the lease bound to

furnish his own water supply, and the defendant without justification, wilfully and maliciously shut off the water to deprive plaintiff of the beneficial enjoyment of the premises, the act would amount to a constructive eviction. The instructions were properly refused. Defendant's offered instruction No. 29 was covered by the 14th instruction given on his behalf.

From an examination of the record, we are unable to say that the verdict is contrary to the manifest weight of the evidence, or that the damages fixed by the jury were excessive. Some testimony on the question of damages was improperly admitted, but the competent testimony in the record is sufficient to warrant a verdict for the amount which the jury fixed as damages. A special interrogatory "Were the damages to the plaintiff caused by the unlawful and malicious act of the defendant?", was answered by the jury in the affirmative. It may be presumed that some part of the damages fixed by the jury was for exemplary or punitive damages, and in connection with the testimony tending to show actual damages, the verdict is not excessive.

Testimony tending to show that defendant shut off the water in order to force plaintiffs to submit to a demand for higher rent was admissible under the issues. If proven, it supplied a motive other than justification on account of noise.

No error in the record has been pointed out from which we would be able to say that if the same was omitted upon another trial, the verdict of the jury would probably be different. The judgment of the trial court is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 29th day of August in the year of our Lord one thousand nine hundred and ~~twenty~~ thirty-one

Clerk of the Appellate Court

(57517—2M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On AUG 28 1931 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8278 Agenda No. 26

A. B. SHEADLE, Trustee of the Estate of Kathryn Southworth, a Bankrupt, Appellant,	:	Appeal from the Circuit Court of Ogle County.
vs.	:	
PEOPLES LOAN AND TRUST COMPANY, a corporation of Rochelle, Illinois, Appellee,	:	

Jones, P. J:

This is a suit to set aside a deed of trust executed by Kathryn Southworth to Peoples Loan and Trust Company of Rochelle, Illinois, within four months prior to the time she was adjudged a bankrupt. The bill was filed by the trustee of the bankrupt's estate against the defendant bank on the theory that the transfer was a preference within the meaning of the Bankruptcy Act. This appeal is prosecuted from a decree dismissing the bill.

Mrs. Southworth is an elderly lady living in Rochelle on a tract of land containing 1.63 acres, which the testimony shows to have been worth about $7,500 to $8,000. She also owned a farm adjoining Rochelle. At one time, she had been well to do, but became involved financially, and on April 1, 1929, she was adjudged a bankrupt. A part of her obligations arose through notes executed by her as joint maker with her son Thomas Southworth and other persons. Her farm consisted of 327 acres, and it was subject to a mortgage to the John Hancock Mutual Life Insurance Company in the principal sum of $30,500, with interest accrued thereon. The trust deed to defendant was executed on January 12, 1939, to secure a note for $3,000. The original indebtedness was incurred by her in the month of May, 1926, at which time she gave the bank a note for 3,000, due in 30 days, which was renewed from time to time thereafter, including the date

when the trust deed was executed. Besides the mortgage to the John Hancock Mutual Life Insurance Company, and the $3,000 note above mentioned, she was also indebted to defendant bank as a joint maker on other notes, with her son and others, in the sum of $19,350, and she was indebted to other creditors in the further sum of $51,819.77, making her total liabilities in excess of $104,000.

Two officers of the bank testified that they considered her farm worth $200 an acre, but the testimony of other disinterested witnesses establishes the value of the farm at not more than $100 an acre. If that testimony be true, her insolvency at the time she made the trust deed to defendant was almost $64,000 in excess of the value of her assets. If it be conceded that the farm was worth $200 an acre at that time, then she was indebted more than $30,000 above the value of her assets. One of the officers of the Bank testified that she had three or four thousand dollars worth of other property, which, if true, would reduce the amount of her insolvency by that amount. In any event, the testimony shows, and counsel for defendant conceded on the oral argument, that Mrs. Southworth was insolvent at the time the trust deed to the bank was executed. Shortly thereafter, in the early part of the following February, an attorney acting for Mrs. Southworth met with some of the bankers of Rochelle and other individual creditors, in an attempt to place her assets in the hands of a trustee for the benefit of her creditors, and defendant bank knew about such effort. There had been no appreciable change in her fianacial condition for six months prior to the date of the trust deed.

Sec. 60b of the Bankruptcy Act, as amended in 1910, provides that if a bankrupt shall have made a transfer of any of his property, and if, at the time of the transfer, or of the recording or registering of the transfer if by law recording and registering thereof is required, and being within four months before the filing of the petition in bankruptcy

or after the filing thereof and before the adjudication, the bankrupt be insolvent and the transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person, etc.

The record shows that Mrs. Southworth was involvent when she executed the trust deed and that within four months thereafter, she was adjudged a bankrupt. In order for such a transfer to constitute a preference under Sec. 60b of the Bankruptcy Act, the creditor must have had reasonable cause to believe that a preference would be effected. The requirement of "reasonable cause to believe" does not demand actual knowledge or actual belief. In determining whether the creditor had reasonable cause to believe that a preference was intended, facts which are sufficient to put an ordinarily prudent man upon inquiry charge the creditor with all the knowledge he could have acquired by the exercise of reasonable diligence. (3 R.C.L. Bankruptcy, Sec. 105; 7 C. J. Bankruptcy Sec. 250; Galbraith v. Whittaker, 43 L.R.A. (N.S.) 427.) Sec. 60b, as it now reads, under the Amendment of 1910, dispensed with any necessity that the bankrupt should have intended a preference ~~or that the creditor should have intended a preference~~ or that the creditor should have believed that such preference was intended, and substituted the effect of what is done for the intention in doing it. (7 C.J. Bankruptcy, Sec. 252 p. 154.)

The record fairly tends to show that the defendant bank had knowledge of facts sufficient to put an ordinarily prudent person upon inquiry as to the financial condition of Mrs. Southworth at the time she made the trust deed. Such ~~known~~ knowledge charged them with all the information they could have acquired by reasonable diligence. $30,500 of her indebtedness was of record and she was obligated to defendant

for an additional $22,350. The president of the bank had known her for fifty years and the cashier had known her since he was 12 years old. They represented the bank in their official capacity, and although they knew she was largely indebted, and although the value of the farm was apparently well known to be not more than $100 an acre, they both testified that at the time the trust deed was executed, they made no effort to inquire into her financial condition. No security for the note of $3,000 had ever been required by the bank since the loan was first made in 1926, until she had become hopelessly insolvent. The weight of the testimony in the record is sufficient to show that the defendant had reasonable cause to believe that she was insolvent when the transfer was made and that a preference would be effected thereby. We are of the opinion that the transfer was a preference within the meaning of the Bankruptcy Act. The court erred in dismissing the bill. The decree is accordingly reversed and the cause is remanded with directions to the chancellor to enter a decree in conformity with the prayer of the bill.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 29th day of August in the year of our Lord one thousand nine hundred and ~~xxxx~~ thirty-one

Clerk of the Appellate Court

(57517—2M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On AUG 20 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8288 Agenda 32

M. H. Fitzsimmons, Appellee	)	Appeal from the Circuit Court of McHenry County.
vs.	)	
William Cowan, et al Fred Siebel Appellant)	)	

Jones, P. J:

On July 22, 1904, William Cowan and Maggie Cowan, his wife, executed a trust deed on a certain lot in the city of Woodstock, to one J. D. Donovan, trustee, to secure a note for $2500, which note became the property of complainant, M. H. Fitzsimmons. On August 20, 1906, William Cowan, alone, executed a second trust deed upon the same property to secure two notes of $1,000 each, payable to the McHenry County State Bank. On November 18th, 1907, appellant, Fred Siebel, obtained a judgment against William Cowan and Maggie Cowan in the sum of $1,729.96 and an execution was issued thereon within one year. Thereafter, on December 6th, 1910, Fitzsimmons filed a bill to foreclose the first trust deed and made the Cowans, Siebel, and the McHenry County State Bank parties defendant. The bank was not served with process and Donovan, the trustee in the first mentioned trust deed, was not made a party to the bill. A decree was entered directing sale of the premises and the payment of the Fitzsimmons note secured by his first trust deed. The decree found the amount due the bank on its notes and further provided that the master "out of the interest of W. Cowan in the remainder, shall cause to be paid to the McHenry County State Bank the sum of $1,087.83, if he can determine such interest," etc.

The master made sale of the premises, reported the payment in full of the amount due Fitzsimmons, and that he had a balance of $1,107.96 in his hands awaiting the further order of the court. Thereafter the court entered an order directing

the master to pay said balance to said bank "and that it be accepted by said bank, subject to the inchoate right of dower, which the defendant, Maggie Cowan, may or may not have in and to said sum." From that order Siebel perfected an appeal to this court. It appearing that the record did not show whether the title to the mortgaged premises was in William Cowan individually, or in Maggie Cowan, or whether they were joint tenants or tenants in common, or whether or not they occupied the premises as a homestead at the time of the execution of the trust deed to the McHenry County State Bank, the decree of the trial court was reversed and the cause remanded for a supplemental decree finding the interests of the Cowans in the premises. (Fitzsimmons v. Cowan, 186 Ill. App. 358.) At the time the appeal was perfected, the then master in chancery, notwithstanding such appeal, paid the balance of $1,107.96 to the McHenry County State Bank, taking a bond for its repayment in case of a reversal of the trial court's decree.

The cause was reinstated and referred to a special master. The name of the McHenry County State Bank had meanwhile been changed to Woodstock National Bank, and it is represented by the latter name in this proceeding. The court entered a decree finding that the payment of $1107.96 to the McHenry County State Bank was properly made and that defendant Siebel has no interest in the fund. From that decree this appeal is prosecuted by Siebel.

William Cowan died in 1915. Maggie Cowan is still living. After this cause was remanded, evidence was taken which discloses that the legal title to the premises was in William Cowan. There is some conflict in the evidence on the question of whether or not the Cowans were occupying the premises as a homestead at the time of the execution of the trust deed to the McHenry County State Bank. The manifest weight of the evidence shows that they were occupying said premises as a homestead at that time, and continued to do so up until sometime in the

year 1909, when they abandoned the same.

A conveyance by a husband in which his wife does not join is not sufficient to transfer the homestead in the premises. The deed of trust to the McHenry County State Bank therefore did not convey the homestead. A conveyance which is not operative to convey the homestead, leaves it in the grantor unaffected by the conveyance, and the homestead estate is to be treated precisely as though the conveyance had never been executed. (Gray v. Schofield, 175 Ill. 36; Fitzsimmons v. Cowan, Supra.) All that the bank took by its trust deed, when it was executed, was the excess of the estate over and above the homestead of $1,000, subject, of course, to the lien of the first trust deed and to the inchoate right of dower of Maggie Cowan. When the premises were abandoned as a homestead in 1909, the lien of Siebel's judgment became at once effective as to the former homestead. The abandonment did not operate to transfer the homestead to the bank under its trust deed, but the lien of Siebel's judgment became at once effective as to the former homestead. The abandonment did not operate to transfer the homestead to the bank under its trust deed, but the lien of Siebel's judgment at once attached thereto. (Gray v. Schofield, supra.) The foreclosure of the first deed of trust, and its satisfaction, left the sum of $1107.96, of which sum the bank, under its trust deed, was entitled to $107.96, less the dower right of Maggie Cowan in that sum. Defendant Siebel was entitled to the $1,000 which represented the homestead before its abandonment.

While an unassigned dower right of a widow cannot be levied upon under an execution against her, it may be reached by a creditor in an equitable proceeding. (Petefish, Skiles & Co. v. Buck, 56 Ill. App. 149; Thompson v. Marsh, 61 Ill. App. 269; Monroe County Savings Bank & Trust Co. v. Klohr, 249 Ill. App. 576.) Siebel's judgment was against both William Cowan and Maggie Cowan. Although her dower had never been

assigned, in equity it should be applied to the payment of that judgment. The decree should have provided that the bank pay to the special master in this cause the sum of $1,000, which represented the former homestead in the premises, and also the value of the dower right of Maggie Cowan in the balance of $107.96, and that the special master pay all of the same over to defendant Siebel. The value of such dower should be computed by reference to standard mortality tables.

As pointed out in the former opinion of this court, there were some irregularities in the process and pleadings in the original proceeding, but the record on this appeal sufficiently shows that McHenry County State Bank submitted itself to the jurisdiction of the trial court. The fact that the former master in chancery who paid the money to it subsequently died can have no effect upon the jurisdiction of the court to enter an order directing the disposal of the fund. When a court of equity acquires jurisdiction for one purpose, it will retain it for the purpose of administering complete relief and doing entire justice with respect to the subject matter. No good purpose would be served by requiring circuitous and involved proceedings in order to arrive at the same end.

The decree is reversed and the cause remanded for further proceedings in conformity with the views herein expressed.

Reversed and remanded
with directions.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 29th day of August in the year of our Lord one thousand nine hundred and ~~twenty~~ thirty-one

Clerk of the Appellate Court

(57517—2M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On AUG 25 1931 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

City of Lockport,
Will County, Illinois
Appellee

vs.

Dowdle Bros., Co., a Corporation,
and Fidelity and Deposit Company
of Maryland, a corporation,
Appellant,

Appeal from Circuit Court
of Will County.

Jones, P.J:

City of Lockport, Illinois, instituted suit against defendants Dowdle Brothers Company, a corporation, and Fidelity and Deposit Company of Maryland, a corporation, to recover on a contractor's bond executed by Nash Dowdle Company and Fidelity and Deposit Company of Maryland, to secure the performance of a contract between Nash-Dowdle Company and plaintiff for the construction of a deep well, pumping station, and appurtenances for said city. Defendant Dowdle Brothers Company is successor of Nash-Dowdle Company. Each of the defendants filed a plea to the jurisdiction of the Court in the nature of a plea in abatement. Demurrers to the pleas were sustained, and in response to an order to plead, each of the defendants filed the general issue. A jury trial resulted in a verdict and judgment against defendants for the sum of $9500.00 from which judgment this appeal is prosecuted.

The first question presented to this court is whether or not the trial court erred in sustaining said demurrers. Section 6 of the Practice Act (Par. 6, Chap. 110, Smith-Hurd Stat. 1929) provides: "It shall be unlawful for any plaintiff to sue any defendant out of the County where the latter resides or may be found, except in local actions, and except that in every species of personal actions in law where there is more than one defendant, the plaintiff

city of [illegible],

Will County, Illi[illegible]

[illegible],

vs.

Dowdle Bros., [illegible]
and Fidelity and [illegible]
of Maryland, a corp[illegible]

[illegible].

Jones, J.P.:

[illegible] of Joliet, [illegible]
against [illegible]
and Fidelity and [illegible]
to recover on a [illegible]
Company and Fidelity [illegible]
secure the performance [illegible]
Company and plaintiff [illegible]
pumping station, and [illegible]
Dowdle Brothers [illegible]
Each of the defendants [illegible]
the Court in the [illegible]
to the place [illegible]
plead, each [illegible]
jury trial resulted [illegible]
defendants [illegible]
appeal is [illegible].

The [illegible]
is whether or not [illegible]
demurrer. [illegible]
Smith-Hurd [illegible] 1927
any plaintiff [illegible]
the latter would [illegible]
and always this [illegible]
where there is [illegible]

commencing his action where either of them resides, may have his writ or writs issued directed to any county or counties where the other defendant, or either of them, may be found." etc.

Dowdle Brothers Company was served with summons in Cook county by the sheriff of that county, and Fidelity and Deposit Company of Maryland was served in Will County by service upon its resident agent in the latter county.

The plea in abatement filed by Dowdle Brothers Company recites that it was residing and doing business in the County of Cook, and not in the County of Will, and was not found or served with process in said County of Will, but was found and served with process in the City of Chicago in the County of Cook. The plea does not set forth that Fidelity and Deposit Company of Maryland, co-defendant, was not a resident of Will County, and makes no reference whatever to such co-defendant. So far as shown by the plea, Fidelity and Deposit Company of Maryland may have been a resident of or otherwise amenable to service in Will County. It failed therefore to negative jurisdiction under section 6 of the Practice Act. If the plea had made any averment in respect to Fidelity and Deposit Company of Maryland, an opportunity to traverse the same would have been afforded plaintiff, and on any such issue it would be entitled to a trial by jury. (Craig v. Sullivan Machinery Co., 259 Ill. App. 1.) The Circuit Court of Will County has general jurisdiction, and as the want of jurisdiction did not appear upon the face of the record, it could only be raised by a plea in abatement. Great accuracy and precision has always been required by law in the structure and form of such pleas. They must be certain to every intent, and if to the jurisdiction of the Court, there must be proper averments of facts, accurately and

logically stated, excluding every intendment of jurisdiction. The presumption is in favor of the jurisdiction. And the pleader must set up such facts as would clearly oust the court of jurisdiction. Presumptions, deductions, arguments, inferences and conclusions, are not sufficient. (Willard v. Zehr, 215 Ill. 148.) The plea failed to comply with such requirements, and the Court correctly held it to be insufficient.

The plea in abatement filed by Fidelity and Deposit Company of Maryland sets out that it is a corporation organized and existing under the laws of the State of Maryland, licensed to do business in this State, and that while it was served with process upon its resident agent in the County of Will, that it was only liabl , if at all, upon the failure of Dowdle Brothers Company, the principal defendant, for the reason that it is surety for the faithful performance of Dowdle Brothers Company, and that said Dowdle Brothers Company was a resident of and doing business in Cook County, and was served with process there and not in Will County. and that as the Court has no jurisdiction over Dowdle Brothers Company, the principal defendant, it ought not to have jurisdiction over "this defendant" as surety for said Dowdle Brothers Company. The bond upon which the suit is brought provides that the makers shall be jointly, and severally liable thereon. Pleading a legal conclusion of primary and secondary liability does not change the language or effect of the obligation. Under section 8 of the Practice Act service was properly had on the Will County resident agent of Fidelity and Deposit Company of Maryland. The provisions of that Act apply to non-resident as well as resident corporations. Booz v. T. & P. Ry. Co., 250 Ill. 376; Scene-in-Action Corp. v. Knights of Ku Klux Klan, 261 Ill. App. 153.) The averment that because its co-defendant was improperly served in Cook County, even if true, is of no avail to a defendant

logically [illegible]

The presumption [illegible]

pleader must [illegible]

of jurisdiction. [illegible]

ference [illegible]

Zehr, 216 [illegible]

requirement, [illegible]

[illegible]

Deposit Company of [illegible]

organized and [illegible]

land, licensed [illegible]

it was served [illegible]

County of [illegible]

failure of [illegible]

for the [illegible]

of Lowell [illegible]

Company v. [illegible]

and was a [illegible]

and that [illegible]

Company, the [illegible]

diction over [illegible]

Brothers Company. [illegible]

provide [illegible]

liable [illegible]

accounts, [illegible]

of the [illegible]

service [illegible]

of Tidewater [illegible]

of that [illegible]

Ross v. [illegible]

Corp. v. [illegible]

agreement [illegible]

in Cook County, [illegible]

jointly and severally liable on the bond, and properly served in the County where the suit was pending. That defense was a privilege available to Dowdle Brothers Company, and is of no concern to its co-defendant properly served in the proper county. It was not necessary that all the jurisdictional facts be averred in the declaration. Where it is possible for the Court to have jurisdiction, it will be presumed the state of facts existed which authorized the Court to assume to enter judgment. A plea to the jurisdiction can not be sustained by reason of any omission in the declaration; but must be sufficient in and of itself to show want of jurisdiction. (Werner v. W. H. Shons Co., 260 Ill. App. 262.) The pleas did not separately or collectively disclose a want of jurisdiction, and the Court correctly sustained each of the demurrers.

The contract provided, among other specifications, that the inside diameter of the well casing and of the uncased portion of the well, for a distance of 400 feet below the surface, should be not less than 15¼ inches; that from the 400 foot point to the caving stratum immediately below the St. Peter sandstone, the inside diameter of the well should be not less than 12 inches, and from said last named point to the bottom of the well, the diameter of any casing or uncased portion of the well should be not less than 10 inches. It further provided that the contractor should furnish and set a 16 inch outside diameter pipe from the surface of the ground to and at least 4 feet into the solid limestone (Dolomite) rock below what is termed the Maquoketa shale, and make a solid water tight connection with said rock; that if a caving stratum was encountered below the St. Peter sandstone, the contractor should furnish and set a 10 inch pipe in such fashion as to shut out any caving material; and that

[illegible]

the well for a depth of 400 feet should be so nearly straight as to permit the free insertion of a straight cylinder 400 feet long and at least 12 inches in diameter.

The record conclusively shows, and it is not disputed, that the well was defective. The weight of the testimony shows that the bottom of the 16 inch pipe was not sealed into the solid Dolomite rock so as to make a water tight joint, as provided by the contract. Large quantities of gasoline were stored in the city in numerous tanks within a mile from the well. Shortly after the contractor turned the well over to the city gasoline was found in the water pumped from the well, rendering it obnoxious for domestic use. Dye stuffs poured outside the casing also found their way into the water. Marbles and sand which were poured around the outside of the casing, with cement and clay, in an effort to seal the fault were also found in the well. The testimony shows that the rods which operated the pump in the well were worn from friction against the sides of the casing, indicating that the hole was not straight, and there is in the record testimony which tends to show a caving below the St. Peter sandstone.

Before any defects in workmanship were discovered, the city's engineer approved the well and issued his final certificate, upon which the city paid the contractor in full. After the discovery of the defects, the contractor denied liability, and the city proceeded to correct them and this suit was instituted. Defendants insist that the contractor was not permitted to go down 400 feet, but was ordered by the City engineer to desist drilling the 16 inch diameter at 363 feet; that by the terms of the contract the engineer had absolute authority over the contractor in the execution of the work, and in approving and rejecting it when finally completed, and that the city is bound by his acts. The contract does not provide that the well should be cased for 400 feet, but that the cased and uncased hole should

extend 400 feet into the ground, and that the portion of the well from the surface to the solid limestone should be cased. The record shows that the subcontractor who drilled the hole called the city engineer and informed him that the well had passed through the shale and penetrated the limestone four feet, and that the engineer asked him to go down another foot so as to go five feet into the limestone rock. The hole was then teated for straightness and the pipe inserted. The testimony fails to show that the engineer stopped the drilling, but on the contrary, shows that the information given him was to the effect that the contract was being complied with, and that he required the subcontractor to go a foot farther than the contract provided. It is also to be noted that Article 33 of the contract provides: "Neither the final certificate nor payment nor any provision in the contract documents shall relieve the contractor of responsibility for faulty materials or workmanship, and he shall promptly remedy any defects due thereto and pay for any damage resulting therefrom, which shall appear within a period of one year from the time of completion of the contract," etc. There is nothing in the record to show any estoppel on the part of plaintiff. The testimony is voluminous, and without further reviewing it here, we are of the opinion that it clearly supports the verdict.

Plaintiff's exhibit 33 is a detailed statement of the amounts expended by the city in connection with the remedying of the defects in the well, etc. The total sum so expended amounted to $21,788.30. The contract for the same was not let by competitive bidding or by a vote of two-thirds of all the aldermen of the city. Sec 50 Art. 9 of the Cities & Village Act. Chap. 24, Par. 121, Rev. Stat. 1929, provides that any work or other public improvements, except those to be paid for by special assessments, shall, when the expense thereof shall exceed $500.00, be constructed by contract let to the lowest bidder in the manner prescribed by ordinance, provided, any such contract may be

entered into without advertising for bids, by a vote of two-thirds of the aldermen etc. It has been held that violations of the provisions of that section may be enjoined by a taxpayer, (Chicago v. Hanreddy, 211 Ill. 24,) but the provisions of that section do not render the exhibit in the case at bar incompetent to show the amount of damages occasioned by the breach of the contract. The liability of the contractor was incurred by its failure to perform the contract, and not by the method adopted by the city in remedying the evil, or paying the costs thereof. By the breach of the contract, the contractor became liable for the ensuing damages, whether or not the city took any step to remedy the defects, or whether or not it paid the cost of so doing. If the city had chosen to bring suit for the breach before doing any work on the well, it would have been competent to show as damages the expense to which the city would be put in remedying the defects. It chose to do the work before bringing suit, and proof of what the work actually cost was competent, whether it was paid for legally or illegally, or not at all.

Two instructions tendered by defendants were to the effect that if the city had not complied with the terms of said paragraph 121 of the Cities and Village Act., it could not recover in this suit. Another instruction tendered by defendants told the jury that the terms of a contract drawn by a municipality are to be construed more strongly against the city than the other party, and ~~of~~ if the city had not strictly complied with the contract, they should find for defendants. Each of the three instructions was properly refused by the Court.

No reversible error appears in the record, and we are of the opinion that upon the merits of the case, the judgment is right and it is accordingly affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 29th day of August in the year of our Lord one thousand nine hundred and ~~twenty~~ ~~thirty~~-one

Clerk of the Appellate Court

(57517—2M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Fifth day of May, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On AUG 1931 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8367 Agenda 26

The First National Bank of Aurora, Guardian of the Estate of Ruth Schroeder, a minor,	:	
Appellee	:	Appeal from Circuit Court of Kane County.
vs.	:	
Harold L. Schroeder and George E. Lidecka, Co-partners Doing Business as Aurora Welding Service,	:	
Appellants,	:	

Jones, P. J:

This is an action on the case instituted by the First National Bank of Aurora, guardian of the estate of Ruth Schroeder, a minor, against Harold L. Schroeder and George E. Lidecka, copartners doing business as Aurora Welding Service. The object of the suit is to recover damages on account of injuries received by said minor in an accident, whereby she was run over by an automobile driven by defendant Harold L. Schroeder, who is her father. She was about six years old at the time of the accident.

The declaration consists of one count, and avers than on September 16, 1928, defendants were engaged in the business of welding, and possessed an automobile used by them in conducting their business; that on the date mentioned while the automobile was being operated by Harold L. Schroeder in behalf of the copartnership, in the city of Aurora, it struck and injured Ruth Schroeder; that she was in the exercise of reasonable care to avoid injury to her; that defendants "as copartners as aforesaid, by Harold L. Schroeder, one of said partners, and Harold L. Schroeder, individually, not regarding the duty of them, and either of them", caused the automobile to be operated contrary to the statute in such case made and provided, and so negligently operated the same as to injure said Ruth Schroeder, to the damage of the plaintiff

as such guardian, in the sum of $10,000.00. A plea of the general issue, and a special plea denying the ownership and operation of the instrumentality causing the injuries, were filed on behalf of defendants. A jury trial resulted in a verdict and judgment for plaintiff in the sum of $3,083.33. This appeal is prosecuted from that judgment.

The record discloses that defendants were partners engaged in the welding business, repairing automobile radiators, brazing, cutting, and work of like character. Each partner owned a car which was used in the business whenever necessary. Schroeder worked in all departments and did some of the office work. The shop was operated 5½ days a week, and it was exceptional for it to be open on Saturday afternoon or Sunday. The accident happened on a Sunday and the shop was not open for business that day.

Mr. and Mrs. Andrew Baumgartner, who lived in Maywood, came to the home of Schroeder about 8:30 o'clock on the Sunday morning of the accident. Baumgartner put his car in Schroeder's garage located in the rear of the house. Mrs. Baumgartner staid at the house with Mrs. Schroeder, and the two men went fishing in the Schroeder car. Upon their return about 4:30 o'clock in the afternoon, Schroeder drove his car into the driveway leading to the garage and left it there. It blocked the driveway, and shortly before dark he started to back his car out, so that Baumgartner could get his car to the street. Schroeder testified that when Baumgartner reached the garage he noticed the floor was wet and called him. He found a leak in the radiator, and suggested that the car be taken to the shop of the Aurora Welding Co. for repair, to which Baumgartner agreed. Schroeder also testified that he meant to charge for the repair, but nothing in particular was said about the charge, and he did not remember that there was anything said about it.

Schroeder's children, including Ruth, were playing

in the yard, and while he was backing his car out of the driveway, he accidentally ran over her, inflicting the injuries for which this suit was brought.

A number of reasons are urged for the reversal of the judgment, but it is necessary to consider only one of them. It is well settled that no recovery can be had by a minor child from his parent in an action of tort. This rule was clearly announced by this court in Foley v. Foley, 61 Ill. App. 577. The reason for the rule is well stated in 20 R.C.L. Parent and Child, 631, as follows: "The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent." The reasons are amplified and couched in somewhat different phraseology, but to the same effect, in Matarese v. Matarese 47 R.I. 131; 42 A.L.R. 1360; Wick v. Wick, 192 Wis. 260; 52 A.L.R. 1113.

The general rule is also stated in 46 C. J. Parent and Child, 1324. An unemancipated minor child has no right of action against a parent or a person standing in loco parentis, for the tort of such parent or person, unless a right of action is authorized by statute. One of the early cases upholding that doctrine is Hewlett v. George, 68 Miss. 703; 13 L.R.A. 682. It has since been followed in Nesite v. Kirchenstein, 109 Conn. 77; 145 Atl. 753; Smith v. Smith, 81 Ind. App. 566, 143 N.E. 128; Elias v. Collins, 237 Mich. 175, 211 N. W. 88; Taubert v. Taubert 103 Minn. 247, 114 N. W. 763; Small v. Morrison, 185 N. C. 577, 118 S. E. 12, 31 A.L.R. 1135; Matarese v. Matarese, Supra; McKelvy v. McKelvy, 111 Tenn. 388, 77 S.W. 664, 64 L.R.A. 991. Roller v. Roller, 37 Wash, 242, 79 Pac. 788, 68 L.R.A. 893; Wick v. Wick, Supra; Ciani v. Ciani, 215 N.Y.S. 767; Sorrentino v. Sorrentino, 248 N. Y. 626, 162 N.E. 551; Manion v. Manion,

3 N. J. Misc. 68;129 Atl. 431.

Because of the firmly established rule as announced in Foley v. Foley, supra, the judgment must be reversed. The judgment is a unit and cannot be reversed as to one defendant and affirmed as to the other. Livak v. Chicago & Erie R.R. Co. 299 Ill. 218. Since we hold there can be no recovery under the facts shown by the record, the cause will not be remanded. The judgment of the trial court is reversed without remanding.

Judgment reversed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 29th day of August in the year of our Lord one thousand nine hundred and ~~twenty~~ thirty-one

Clerk of the Appellate Court

(57517—2M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES G. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8255 No. 3.

In the Appellate Court of Illinois

Second District.

October Term, A. D. 1931

Elgin City Banking Company, a corporation, as Trustee, complainant and Appellee,

vs.

Ethel Webster and Marguerite Weld, Executors of the Estate of William Hubbard, Deceased, Ethel H. Webster, Roy F. Webster, Marguerite H. Weld, Lyman L. Weld and Betty Jane Weld,

Defendants and Appellees,

and

American Missionary Association, a corporation,

Defendant and Appellant.

Appeal from Circuit Court of Kane County.

Opinion by Fred G. Wolfe, Justice.

The bill in this case was filed by the Elgin City Banking Company, as trustee under the will of Henry W. Hubbard, deceased, and as successor in trust under the trust instrument hereinafter mentioned, to construe the said will and to fix and determine the rights of the defendants in and to certain premises in Elgin, Illinois, referred to as the "Hubbard Block," and for instructions as to the distribution of the rents thereof and the proceeds from the ultimate sale thereof when sold. The case turns upon the construction of the twelfth clause of the will of Henry W. Hubbard in which the trustee, the complainant below, is directed to deduct "interest at the rate of five per cent per annum upon such balance as, by the last annual statement made by me prior to my death, pursuant to article fourth of said last mentioned instrument (the trust instrument) shall be shown to remain unpaid of the sums advanced by me for the alterations, improvements and repairs of said premises." from

the net income of said property before making distribution to the beneficiaries, and upon similar provisions as to the distribution of the proceeds from the sale of said premises upon the termination of the trust.

The trial court, in construing the will, found that "the last annual statement," referred to in said will, was not in existence at the time of the execution of the will, and decreed that the above quoted provision, and other similar references in clause twelve of the will, were null and void.

The 1910 Henry W. Hubbard was the sole owner of the premises in question, and was then engaged in the repair and remodeling of the building thereon. On June 29, 1910, and while the remodeling was in progress, he executed a trust instrument to himself as trustee, and in favor of a brother, William Hubbard, and his family. In the trust instrument, Henry W. Hubbard reserved the control and management of the property and certain rights of sale and purchase, not material here. From the net income there was to be deducted and retained by him interest at five per cent per annum on such sums as he might expend for the repair and remodeling of the building (total cost not being then known or ascertainable) and seven-sixteenths of the net residue was then to be paid to Callie E. Hubbard (wife of William Hubbard) during her lifetime, and then William Hubbard, if he survived, during his lifetime, and after the death of both Callie E. and William Hubbard, to Ethel Hubbard, now Ethel Webster, and Marguerite Hubbard, now Marguerite Weld. The balance of the income Henry W. Hubbard retained for himself.

Upon the termination of the trust, after the death of the survivor of said four specified beneficiaries, the premises were to be sold and from the net proceeds thereof Henry W. Hubbard was to retain the balance remaining unpaid of the same expended for the repair and remodeling of said building, and seven-sixteenths of the residue was to be divided among and

paid to the heirs of William Hubbard as determined by the laws of descent of the State of Illinois.

Article 4 of the trust instrument became important because it was referred to in the twelfth clause of the will. It was there provided:"IV. That a full, correct and accurate account shall be kept of all rents, issues and income derived from said premises, and of all payments and expenditures made in and about the care and management thereof; and that at least once a year a transcript of such account for the twelve months immediately preceding its date shall be furnished to said Callie E. Hubbard during her lifetime and, after her death, to the person or persons entitled here nder for the time being to receive the benefit of the trust hereby created and declared."

Remodeling the building was commenced in the spring of 1909 and completed in September, 1910 and cost approximately $44,042.53. Henry W. Hubbard operated and managed the property and collected the income until his death on May 21, 1913, and no attempt was made by him to sell the premises or to exercise the right of purchase reserved to him. There is no evidence that he ever rendered or furnished Callie E. Hubbard an annual statement as required by said Article 4, or that he ever accounted to her for any portion of the rents or income.

The will of Henry W. Hubbard was executed May 9, 1911, and after making various specific bequests, including $1,000.00 each to William Hubbard, Callie E. Hubbard, Ethel M. Hubbard and Marguerite E. Hubbard, provided that if his estate, other than his interest in the premises in question, should not be sufficient to pay the legacies in full then the legacies should abate pro rata. Clause 10 referred to and confirmed the trust instrument aforesaid, and, pursuant to the power therein reserved, appointed the Elgin City Banking Company, the complainant below, as successor in trust thereunder.

By Clause 12 of his will, the said Henry . Hubbard disposed of the premises in question and his entire interest therein. He devised the entire title to said premises to the Elgin City Banking Company, the complainant below, in trust, during the life time of the survivor of the four beneficiaries mentioned in the trust instrument, namely, William Hubbard, Callie E. Hubbard, Ethel M. Webster and Marguerite E. Weld, to control and manage "as a whole," and out of the net income, after deducting expenses and commissions, to deduct "interest at the rate of five per cent per annum upon such balance as, by the last annual statement made by me prior to my death pursuant to article fourth of said last mentioned instrument (the trust instrument) shall be shown to remain unpaid of the sums advanced by me to pay for the alterations, improvements and repairs of said premises mentioned in the fourth preamble to said last mentioned instrument," and then to pay seven sixteenths of the net residue in quarterly installments to the person or persons who for the time being shall be entitled to receive the same under the provisions of said last mentioned instrument, and out of the interest reserved, as aforesaid, and ninesixteenths of said residue of said income, to pay to William Hubbard, during his lifetime, in equal quarterly installments, the sum of $1200.00 per annum, and to pay the balance of such residue, and after the death of William Hubbard, the whole of such residue, in equal quarterly installments to the American Missionary Association.

The same clause further provided that upon the death of the survivor of said four beneficiaries mentioned in the trust instrument, the premises should be sold by the Trustee, and that out of the net proceeds of such sale there should be "deducted and reserved the balance of my aforesaid advances for alterations, improvements and repairs, which, by the last annual statement above referred to shall appear to remain unpaid." and that seven sixteenths

of the residue be paid to the person or persons who will then be entitled thereto under the terms of said last mentioned instrument, and that the sum reserved as last above provided, together with nine sixteenths of said residue, be paid to the American Missionary Association to be used in its work among the colored people of the south.

After the death of Henry W. Hubbard, the complainant, as trustee, took charge of the property. Annual statements of the rents collected and expenses paid were furnished by the complainant to the American Missionary Association and to Callie E. Hubbard until her death June 29, 1925, and durin that time the complainant deducted interest at five per cent per annum on the sum of $19,268.60, or $963.43, each year from the seven-sixteenths share of the net rents before making distribution to Callie E. Hubbard. Upon the death of Callie E. Hubbard, her husband, William Hubbard, became entitled to said distributive share of the rents and he objected to the deduction of said interest. This suit to construe the will then followed.

Betty Jane Weld, a minor, the only grandchild of William Hubbard, and the only representative in ease of the class which will take the corpus of said estate in said seven-sixteenths interest in said premises, was made a defendant and a guardian ad litem was appointed for said minor.

The bill as filed set up the trust instrument and the will, as well as the facts as summarized above, and alleged that in view of the contention of William Hubbard that he was entitled to receive the entire seven-sixteenths share of the net rents from said premises without deduction of any interest, and his contention that the portions of the twelfth clause of said will referring to a "last annual statement" as the place where the figure or amount was fxm to be found on which interest was to be computed, were null and void, it could not safely distribute the annual net income

from said premises until a court of competent jurisdiction had construed the said will and fixed and determined the rights and interests of the parties in said premises under said will and under said trust instrument.

The answers of the William Hubbard family admitted substantially all of the allegations of the bill and averred that no specific sum of money was recited in the last annual statement made by Henry W. Hubbard, if any such statement was ever made; that no such statement was ever rendered to Callie E. Hubbard during her lifetime or to any of the other defendants, and that the complainant did not have any authority to make any deductions from the seven-sixteenths share of said annual net income.

The answer of the American Missionary Association likewise admitted substantially all of the allegations of the bill, but averred that the contention of the said William Hubbard was improper. The answer also averred that Henry W. Hubbard did in fact make a last annual statement pursuant to article four of the trust instrument and that the cost of said alterations, improvements, and repairs, as shown by said statement, was $44,042.53, and averred that the portions of the twelfth clause of said will referring to said last annual statement are valid.

The facts in the case are not in dispute. The stipulation of facts entered into between the parties and the testimony of Mr. King and Mr. Abel, together with the will of the deceased, the trust agreement and documentary evidence, constitute the evidence in the case. It is not disputed that Henry W. Hubbard in repairing the Hubbard building expended approximately $44,000.00. The dispute arises as to whether the proportional amount of this $44,000.00 shall be deducted from the amount that is to be paid to the American Missionary Association. The main controversy in the case arises out of the reference made in the will of said Henry Hubbard to the "last annual statement".

It is the contention of the appellees that inasmuch no such statement was in existence at the time the will was executed it cannot now be incorporated as a part of the will so as to give it testamentary effect, and therefore, no deduction can be made from the interest of the appellees of any unpaid balance of the cost of remodeling the Hubbard building. If no reduction is made on account of such repairs, then the beneficiaries under the trust agreement would get more than they would if they had to pay their proportionate share of the cost of such repairs, and the American Missionary Association would get correspondingly less.

In the construction of a will the courts try to construe a will in accordance with the intent of the testator if this can be done without violating any of the established rules of law. The appellant contends that because the testator in his will confirmed the trust instrument and appointed successors in trust, the trust instrument became a part of the will, and that these two instruments should be construed together in ascertaining the intent of the testator; that in some respects it is the same as a will and a codicil. The appellee's theory is that these are two separate and distinct instruments, and there being no 'annual statement', as mentioned in the will, the trust agreement and the will cannot be construed as a will and a codicil. It is further their contention that the testator, by his will, had a right to and did enlarge the estate that he had given to these parties under the trust agreement.

We are of the opinion that the testator, Henry Hubbard, both by the trust agreement and by his will, intended to charge the appellees with their proportionate share of the repairs upon this building. The question for this court to determine is whether this amount has been properly proven so that the chancellor could ascertain what each party should be charged, or what their proportionate amount of this sum should be.

The stipulation shows that Henry W. Hubbard kept an account book entitled 'Costs of Hubbard Block, Elgin, Illinois." and it is agreed that this book referred to the premises in question. This balance was carried March 3, 1913 and shows the amount at that time to be $44042.53. The architect employed by Hubbard when he remodeled the building, testified as to the cost of the repairs to the building. Mr. King, a New York attorney for Henry W. Hubbard, testified to the contents of an account book that had been lost, and corroborates Mr. Abel relative to the costs of the repairs. The appellees, at the time of the hearing, objected to the introduction of a part of this testimony. The objections were very general and assigned no reason whatsoever for the objections and did not point out to the court in any manner why the evidence was incompetent. (Judy vs. Judy, 261 Ill. 474.) In the appellee's brief and argument they make no mention of the incompetency of the evidence, so we take it that they have waived this point.

The amount of the costs of repairs was definitely known to the testator to be the sum of $44042.53 at the time the will was drawn, and both the trust agreement and the will itself made a charge of seven-sixteenths of this amount against the interest of the beneficiary. It seems to us the only purpose of the reference made by the will to the 'last annual statement' was to ascertain, if any, what reduction had been made in such charge. If a portion of this amount had been paid off then a charge of seven-sixteenths of the $44042.53 must be reduced proportionately, and under no circumstances could the amount be increased. The reference to the annual statement was made for the purpose of computation only, and was not for the purpose of altering or changing the bequest. The testator fixed the bequest definitely and it amounted to seven-sixteenths of the net proceeds of the sale of the property less the proportionate amount of repair or

alteration costs which remained unpaid at the date of the distribution of the estate.

There is another theory which we think sustains the conclusion that this amount should be deducted before a distribution of the estate should be made. If the language "by the last annual statement" above referred to, be stricken from the context of the will and be given no effect whatsoever, the will is sufficiently definite to show that seven-sixteenths of the unpaid cost of altering the building shall be deducted from that portion of the proceeds of the sale to which the family were entitled. This theory is consistent with the direction of the testator as to the charitable bequest that he made and is sufficient without any reference to the 'annual statement' and the provision was sufficiently definite and certain to require a reduction to be made. The decree and judgment of the circuit court of Kane County is hereby reversed and the case remanded to said court with directions to enter a decree in conformity with the views expressed in this opinion.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(65027—1M—9-31) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED W. WOLFE, Justice.

Hon. JAMES A. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8269 4 Agenda No. 6

IN THE

APPELLATE COURT OF ILLINOIS.

Second District

October Term, A.D. 1930.

E. H. MORGAN, Administrator of the Estate of ELEANOR JEAN MORGAN, Dec'd,
Appellee,

vs.

T. H. CULHANE,
Appellant

Appeal from the Circuit Court of Winnebago County.

Opinion by Fred G. Wolfe, Justice.

E. H. Morgan, administrator of the estate of Eleanor Jean Morgan, deceased, filed his declaration in the Circuit Court of Winnebago County, Illinois, to the January 1929 Term of that Court. It charged that T. H. Culhane, the defendant, was the owner of a certain Lincoln Sedan automobile on the 5th day of May, 1928. On that day it was driven by his son, John, with the consent and knowledge of the defendant; that the car was kept for family use; that John drove the car upon the Grant Highway running between the cities of Belvidere and Rockford, Illinois; that when about two miles west of the City of Belvidere, Illinois, while Eleanor Jean Morgan, with all due care and diligence for her own safety, was then and there riding in the car at the invitation and request of John, the said John, then and there so improperly, carelessly and negligently drove and managed the said automobile that by and through the negligence and improper conduct of the defendant, by his son in that behalf, the automobile turned over and threw the said Eleanor Jean Morgan with great force and violence against the top thereof, then out and upon the ground, and she

was then and there killed. The declaration contained the usual averments of the next of kin; that Eleanor died on the 6th day of May, 1928. The sum of $10000.00 ad damnum was laid in the declaration. The defendant filed a plea of the general issue. The case was tried at the April 1930 Term of the Circuit Court and the jury brought in a verdict in the sum of $5,500.00. Defendant below, appellant here, appealed to this court and filed a bond, etc.

At the close of the plaintiff's evidence the defendant asked the court to instruct the jury as a matter of law to find the defendant not guilty. The court refused to give the instruction. At the close of all the evidence the instruction was again presented and refused.

The court on behalf of the plaintiff gave but one instruction, which is as follows: "The Court instructs the jury that if you believe from the evidence that the defendant kept and maintained the automobile in question for the use of himself and family, and permitted the use of the same by members of the family, and if you further believe from the evidence that John Culhane was the son of the defendant and a member of his family and if you further believe from the evidence that the said John Culhane, at and immediately prior to the accident in question , carelessly and negligently drove and operated said automobile in which the deceased was riding as a guest, and if you further believe from the evidence that by reason of such carelessness and negligence in so driving and operating said automobile, the said deceased was injured and died as a result thereof, then you should find the defendant guilty, provided you further believe from the evidence that the deceased at and just prior to the time of the accident in question, was in the exercise of ordinary care for her own safety."

The theory on which the case was tried is what is commonly called the family purpose doctrine,-- that is, by reason of the fact that the defendant had furnished his son John with an automobile to drive and had given his permission on this and on other occasions to drive the car-- that the act of the son would be the act of the father, and therefore, the father would be liable for the acts of negligence on the part of the son.

Whatever the rulings of our Supreme and Appellate Courts have been prior to the time that the Supreme Court passed upon the case of White vs. Seitz, 342, Ill., 266, relative to the family purpose doctrine, this question was settled, that the so-called family purpose doctrine is not the law in the State of Illinois. In the case of Andersen vs. Byrnes, 344 Ill., 240, our Supreme court reaffirmed the decision in the case of White vs. Seitz (supra).

Other questions are raised by the appellant in this case, but we do not deem it necessary to pass upon them since the whole theory on which the case was tried was upon the family purpose doctrine. The Supreme court having repudiated that doctrine, necessarily this case must be reversed.

After the filing of the printed briefs and arguments, appellants asked leave to file additional authorities, which was granted. The appellant's motion for a directed verdict at the close of the plaintiff's evidence, and also at the close of all the evidence, sufficiently raises the question as a matter of law whether the defendant was guilty as charged in the declaration. It is our opinion that the case should be reversed and remanded to the Circuit Court of Winnebago County, which is accordingly done.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(65027—1M—9-31) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8322 Agenda No. 18

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A.D., 1931.

LOUISE RISIUS, Appellee, vs. F. H. HEINZ, Appellant.	)	Appeal from the Circuit Court of Peoria County.

Opinion by Fred G. Wolfe, Justice.

Louise Risius, on August 27, 1927, in attempting to walk across State Highway No. 30, was struck by the automobile of the appellant, which was then being driven by his son Walter, in an easterly direction on said highway. She sustained serious physical injuries as a result of the collision, and brought an action in the circuit court of Peoria County, of trespass on the case against the appellant. Her declaration contains three counts. The first count in general terms charges negligence of the driver of the car; the gravamen laid in the second and third counts is that the car was being driven at excessive speed. To the declaration the appellant filed the general issue. A jury trial resulted in a verdict and judgment for $7500.00 in favor of the appellee against the appellant. At the trial, no evidence was introduced to sustain the charge of excessive speed of the automobile as alleged in the second and third counts. Motions for a directed verdict and a new trial, all filed in

apt time according to trial practice, were made by the appellant and overruled by the trial judge. The issue in the case has become narrowed and confined to the questions as to whether the driver of the automobile was guilty of negligence, and the defendant free of contributory negligence at the time of the accident.

Neither question stated may be resolved in favor of the appellee unless the evidence sustains, according to the rules governing this court as a reviewing tribunal, appellee's theory which she pursued during the trial, viz., that the appellee, at the time she was struck by the automobile, was on the right hand or north side of the highway. The correctness of this proposition is in effect conceded by the appellee in her argument. It does not necessarily follow, when all the facts appearing in the evidence are considered, that if the evidence does show that the appellee was on her right side of the highway at the time in question, that the judgment must necessarily be affirmed.

The evidence shows that the appellee on the date of the accident was 26 years of age and then, and during her life time, resided about a mile west of the City of Peoria on the south side of State Highway No. 30. The appellee lived with her mother, a sister and a brother in a house standing about 220 feet from the pavement of the highway. There is a driveway on the premises which leads from the highway to the house. At the time of the accident the appellee was the owner of a beauty shop in Peoria, and on August 27, 1927, at about 6:45 o'clock p.m. she left her shop and rode in a bus to the corner of Loucks and University streets. At this place she accepted an invitation to ride to her home, extended by Mrs. Marie Grant who was driving a coupe, or one seated automobile, accompanied by a Mrs. Smith. Appellee was seated on the right hand side of the car and rode with these two women out Highway No. 30 to a point nearly opposite her home. Highway No. 30, it is stated

in the evidence, extends east and west and the Grant car was being driven toward the west as it approached the Appellee 's home. At that time the middle portion of the highway was paved with concrete of the width of 10 feet and there was a black line, such as is usually marked on paved State Highways, in the center of the concrete, extending in both directions parallel to the sides of the concrete slab. On both sides of the concrete, and flush up to it, there were strips of asphalt three feet wide, thus making the paved part of the highway 16 feet wide. The pavement was supported by dirt shoulders on its sides.

As Mrs. Grant, driving on the north side of the highway, came almost apposite the driveway of the appellee's home, she drove her car farther to the north off the pavement so that the two right wheels of her car were on the dirt shoulder about a foot, where she stopped her car. The appellee got out of the car alighting on the dift shoulder on the north side of the pavement, proceeded to the rear of the car, and stepped on the pavement with the intention of crossing the highway to reach her home.

The appellee testified that when she stepped on the asphalt, she looked toward the east and did not see a car approaching from that direction; after taking a few steps from the north ~~ne~~ line of the asphalt, and one step on the concrete, she looked west and was immediately struck by the automobile driven toward the east by the appellant's son; that when she looked west she did not have a chance to see anything before being struck by the car; that at the time she was hit she had one foot on the asphalt and the other on the concrete.

Marguerite Risius, sister of appellee, testified that she was in the field of the Risius premises between 100 and 200 feet from the place of the accident; that it was still light and she could see for a distance of three or four blocks; that she first saw the appellee when she stepped out of the Grant car and also saw her struck by the appellant's car. On cross examination she testified that she first saw the appellee as

she came around the rear of the Grant car. She further testified that she saw the appellee stop, look toward the east, and as the appellee turned away she was struck by the appellant's car; that the appellee was right at the edge of the pavement and asphalt on the north side of the highway when she was struck; that the Grant car had been driven forward about 50 feet when the accident happened and there was nothing between the point where the appellee was standing and the appellant's car as it approached the appellee that would interfere with the appellee seeing the car of the appellant. She testified that the appellee was lying entirely on the asphalt part of the pavement after she was hit.

Thomas E. Hoagland testified that he was on his premises on the north side of the highway and about 200 feet from the place of the accident when it occurred; he did not see the car strike the appellee, but he heard the impact of the car against her and heard her scream; that he arrived at the locus delicti when the appellee was being picked up by Walter Heinz and one of the ladies who had been in the Grant car; the appellee was lying in the line of traffic taken by automobiles going west; the two left wheels of the appellant's car were about a foot over the north side of the black line and its right wheels were on the south side of the black line, as it stood in the highway after the accident. He did not know whether or not the car of appellant had been moved after striking the appellee. Marguerite Risius testified that the appellant's car had been backed after the accident.

Mrs. Grant testified that she stopped her car with its two right wheels off the asphalt about a foot to the north, and the other two wheels were on the concrete. After the appellee stepped out of the car on to the dirt shoulder, Mrs. Grant drove her car forward to place it back on the main part of the highway and had gone about the length of her car when the Heinz car passed her being driven on the south side of the black

line and straight toward the east; the Heinz car did not pass close to her car; that at that time, her car was back on the pavement, but slanting just a little and not fully in line to proceed; that she found the appellee lying across the black line a distance of two or three car lengths from her car; the appellee's head was across the black line on the north side, and her feet were on the south side of the line. The Heinz car was parked on the south side of the highway and off the pavement and about a car length from where the appellee was lying. She also testified that the appellee ran after she got out of her car, but she could not see appellee at the time she was struck.

Walter Heinz testified that he was driving on the highway toward the east. He noticed the Grant car in the road from a distance of about 700 feet. As he approached that car and was about even with it, the appellee stepped out from the rear of that car and she struck the front of the left fender of the appellant's car with her hands and fell down. He drove the car off the pavement onto the dirt shoulder on the south side. He testified that he did not at any time before or at the time of the accident drive the car over the black line to the north. The Heinz car was even with the appellee when he first saw her emerge from behind the Grant car. In an effort to avoid striking her, he swung the Heinz car to the right, or southward. The appellee was three or four feet in front of the Heinz car when he first saw her and she was then on the south side of the black line.

The evidence shows that the driving lights on both of the cars were lighted at the time in question. As near as can be determined from the evidence, the accident happened about 7:30 p.m. Mr. Hoagland testified that the condition of the light was such that he could see; it was after sunset; it was clear; he could see appellee lying in the road from his position 275 feet away. Mrs. Grant testified that it was dusk and not "clear dark"; she could not say if she could have seen

a car a block away without lights on the car. Walter Heinz testified that it was not light; "I could not see out in the fields very far. I could not see Marguerite Risius out in the field.

Upon the material question of fact whether Walter Heinz was driving the appellant's car on the south or the north side of the black line at the time of the accident, the evidence is in conflict. The appellee and her sister testified that the appellee was hit by the automobile when she was not beyond the black line, but north of it. Their testimony is contradicted by that of Walter Heinz. Mr. Hoagland's testimony, (although it is weakened by the testimony of Marguerite Risius that the car had backed) that the appellant's car after the accident was standing with its left wheels north of the black line, is contradicted by the testimony of Walter Heinz and that of Mrs. Gran. The evidence is in conflict whether the appellee was lying north or south of the black line after the impact.

The credibility of the witnesses and the weight to be given their testimony are usually questions of fact for the Jury to determine, and unless their findings are manifestly contrary to the weight of the evidence, a reviewing court if not justified in disturbing their findings. This court is reluctant to reverse the judgment of a circuit court on a question of fact found by a jury. The burden of proof in this case is upon the plaintiff to prove by a preponderance of the evidence that the defendant, through his son, was negligent in operating the automobile at the time of the accident in question and to the injury of the plaintiff.

We are of the opinion that the evidence of such negligence does not preponderate in favor of the plaintiff and the judgment of the circuit court of Peoria County should be reversed and the case remanded for a new trial. Reversed and remanded.

STATE OF ILLINOIS. }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

8244

31

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the ninth day of October, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES . BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

263 I.A. 632

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8344 Agenda No. 9

IN THE

APPELLATE COURT OF ILLINOIS.

Second District

April Term, A. D., 1931.

Charlotte Osborn, Admrx., of the
Estate of Roy Osborn, Dec'd.
Plaintiff in error

vs.

Homer L. Parkhill,
Defendant in error

Error to the Circuit Court of Livingston County.

Opinion by Fred G. Wolfe, Justice.

Edward Matthai with Laura Nash, which prior to the trial had married, and Mr. and Mrs. Roy Osborn attended a dance at a resort called 'Dreamland'. After the dance the four named persons got into the car of Mr. Matthai's and started home. Matthai and his wife sat in the front seat and the Osborns in the rear seat of the automobile. The Osborns were guests of Matthai and had nothing to do with the control of the car. The automobile was being driven in a northernly direction on State Highway No. 4 in Livingston County, and as it approached the intersection of the highway commonly known as and designated as No. 116, the car collided with an automobile being driven by Dr. Homer L. Parkhill, the defendant in this case, and as a result of the accident Roy Osborn was injured and later died. Charlotte Osborn as administratrix of his estate brought suit in the Circuit Court of Livingston County to recover of the defendant for his death.

The evidence shows that at the time of the collision the

car in which the plaintiff intestate was riding was being driven along the hard surfaced road at the rate of from 40 to 45 miles per hour on highway No. 4; that highway No. 4 is a part of a system of highways designated by the Statutes of the State of Illinois, as one of the roads 1 to 46 inclusive, in the Act selecting such routes for improvement by the State, and upon which has been constructed a durable hard-surfaced road.

As Dr. Parkhill drove along highway No. 116, he did not stop his car before driving onto Route No. 4, and this, it is claimed, by the plaintiff, was negligence on the part of the defendant, and was the proximate cause of the injury that caused the death of Roy Osborn. The trial was had before a jury and a verdict rendered in favor of the defendant. Judgment was entered on the same and the case dismissed, and plaintiff brings the case to this court on a writ of error.

The plaintiff asked the court to instruct the jury as follows: "The court instructs the jury that it is provided by the Statute of the State of Illinois that motor vehicles entering upon or crossing a highway, which has been designated by law as one of Routes 1 to 46 inclusive, in the Act ~~nix~~ selecting such routes for improvement by this State, and upon which has been constructed a durable hard-surfaced road, shall come to a full stop as near to the right of way line as possible before driving on the paved portion, and regardless of direction, shall give the right of way to vehicles upon said highway."

The court modified said instruction by adding the following: "unless the vehicles upon said highway are sufficiently far away, so that, if they are being driven with due care, they will not reach the intersection until the car which is entering upon or crossing the highway will have had time to come to a full stop and then proceed and pass."

The plaintiff also asked the court to give the following instruction: "The jury are instructed that it was the duty of the defendant in approaching State Highway No. 4, upon which the accident occurred, to bring his automobile to a full stop as near the right of way of said highway

as possible, and to give the right of way to the vehicle in which plaintiff's intestate was riding on said state highway."

But the court modified the instruction by adding the following: "Provided you believe from the evidence that the car in which plaintiff's intestate was riding was sufficiently close to the intersection so that if being driven with due care it would reach the intersection before there would be time for the plaintiff's car to come to a full stop and then proceed and pass over."

We think that the instructions as modified are erroneous, and giving them to the jury is reversible error. The statutory provision is that a car, before being driven onto State Highway No. 4, "shall come to a full stop." The language of the statute is imperative, and provides for a fine, not to exceed $100.00 for a violation of thissection of the statute. It was the duty of Dr. Parkhill, before entering upon highway No. 4, to come to a full stop regardless of whether the highway was being traversed by any one. The evidence clearly establishes the fact that at the intersection of routes Nos. 4 and 116, that on the east side of route No. 4 there was a sign about 5-feet by 3-feet , which read, "State Road. Stop." Whether the first instruction as presented, without modification, correctly stated the law, there is no question that the second instruction properly stated the law and it was the imperative duty of Dr. Parkhill to stop his car before driving onto route No. 4, regardless of whether there was any traffic on route No. 4 at the time.

Complaint is made that the court gave erroneous instructions to the jury at the request of the defendant relative to the contributory negligence of the deceased Roy Osborn. We think that instructions Nos. 10, 11, and 12, are erroneous, and is an attempt to impute the negligence of the driver Matthai to the deceased Osborn, and should not have been given in the form that they were given.

Instruction No. 15 is erroneous as it practically tells the jury that there was no duty resting upon Dr. Parkhill to bring his car to a full stop before entering upon route No. 4, if, in his opinion, he would have time to pass over the intersection before the approaching car could reach the same and under such circumstances the approaching car on route No. 4, would not have the right of way over Parkhill. This instruction was erroneous. The same question was involved in Montanya vs. Wilbur Lumber Company, 251 App., 368, in which the courts say: "Under the provisions of this section, no one has a right to cross a hard road, until he has stopped and ascertained that the way is clear for him. Cars on any road designated by this section, no matter from which direction they are coming, have the right of way over cars on intersecting roads."

The instructions in this case are such as to at least intimate, if not inform the jury, that the negligence, if any, of the driver of the car in which the plaintiff's intestate was riding, may be imputed to the deceased. From an examination of the record in the case we find no basis in the evidence for such an intimation, and the instructions should not have been given.

In considering the whole e vidence, this court is of the opinion that the verdict is manifestly against the weight of the evidence, which was probably induced by the jury being given erroneous instructions. The judgment of the Circuit Court of Livingston County is hereby reversed and the case remanded.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(65027—1M—9-31) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FREI G. WOLFE, Justice.

Hon. JAMES C. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, sheriff.

Oct. BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8300

Reuben H. Stripe

appellee

vs.

City of Waukegan, et al

(Louis J. Yager, Mayor, et al

appellants)

Appeal from Circuit Court of

Lake County.

PER CURIAM:

The questions involved in this cause are the same as those involved in general number 8299, in fact the cases were consolidated and one set of abstracts of record and briefs and arguments were filed to cover both cases. The opinion filed in general number 8299 is decisive of the questions involved herein and the judgment of the Circuit Court of Lake County in the above entitled cause is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FREDERICK W. WOLFE, Justice.

Hon. JAMES C. BALDWIN, Justice.

JUSTUS E. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8332 Agenda No. 32

Stacy J. Merriner, doing business under the name of Merriner Land Company,

Appellee

vs.

Edward Baker,

Appellant.

Appeal from the Circuit Court of La Salle County.

Opinion Per Curiam:

Stacy J. Merriner, a licensed real estate broker engaged in the real estate business under the name of Merriner Land Company, instituted suit in December, 1926, against Edward Baker and Baker Brothers Company, a corporation, to recover commissions claimed to have been earned as broker in securing a purchaser for certain property belonging to Baker Brothers Company.

The declaration contained four counts, the last three of which were various forms of portions of the common counts. The first count averred in substance that defendant corporation was the owner of lots 1, 2, and 8 in Block 36 in the City of Streator, Illinois; that defendant Edward Baker was president of the corporation and owner of ninety-five per cent of its capital stock; that on June 4, 1925, Baker, on behalf of himself and the corporation, employed plaintiff to find a purchaser for said real estate within ten days thereafter, at the price of $80,000 cash, and promised to pay him $3,000 for such services; that within the time specified he procured John Scullans and Tony Berrettinni as purchasers for the property, who were and still are ready, willing, and able to pay, and who offered to pay the purchase price of $80,000 therefor; that the agreement between plaintiff and defendants was oral, but

was confirmed by a writing of the same date to the effect that if plaintiff could sell the warehouse located at 517-521 East Main Street, Streator, within ten days thereafter for $80,000 cash, defendants would pay him a $3,000 commission; that the property described in the written confirmation is the same property above averred to belong to said company; that Baker delivered to plaintiff an abstract of title to the property for examination and promised to give a deed to the purchaser, but shortly thereafter refused to do so; that defendants have been frequently requested to convey the property but have refused so to do and have refused to pay plaintiff his commission of $3,000, which has been due since June 15, 1925.

Edward Baker filed a plea of the general issue, and a verified plea that he did not make and deliver the writing mentioned in the declaration. The suit was dismissed as to Baker Brothers Company. A jury trial resulted in a verdict and judgment against Baker for $3,000 and costs of suit. From that judgment this appeal is prosecuted.

The record shows that on April 27, 1925, Baker Brothers Company executed a written agreement, promising that if within ten days thereafter plaintiff found a purchaser who would pay $110,000 for its real estate occupied by it as an office and warehouse at 519 East Main Street, Streator, and who would also pay the inventory value of all stock, supplies, fixtures, and other personal property in the building, the company would, upon completion of the sale, pay plaintiff a commission of five per cent on the sale price. No sale was made under that contract, and by its terms, it had expired.

By the testimony of both plaintiff and defendant it appears that on June 4, 1925, defendant told plaintiff that if he would sell the building within ten days for $80,000 cash, he would pay him a commission of $3,000. This agreement was on the same day confirmed by a writing signed by defendant.

Plaintiff entered into negotiations with John Scullans and Tony Berrettinni, officers of Chicago Fruit Produce and Supply Co., for the sale of the property. The negotiations culminated in a written contract dated June 5, 1925, and executed on June 9th. It was signed "Baker Bros. Company by J. S. Merriner, Agt.", and "Chicago Fruit Produce & Supply Co., by Tony R. Berrettinni, President." The contract provided in substance that Baker Brothers Company agreed to sell and convey to the produce company by warranty deed said lots, 1, 2, and 8 for $80,000, payable $100. in cash and the balance within five days upon delivery of deed and abstract showing a good merchantable title; also to convey by bill of sale a coffee plant with motors, a safe, desks, chairs, filing cabinets, wheel-trucks, scales, shelving, fixtures, and other personal property; and to give to the purchasers all trade-marks and brands free of charge, execute a bond for $25,000 conditioned that it would stay out of the grocery business in Illinois for the next ten years, and assign gratis all existing insurance on the property. The deed was to be delivered within five days upon the payment of the purchase price, and possession of the premises was to be given January 1, 1926.

On or about June 8th or 9th the prospective purchasers applied to the Peoples Building and Loan Association of Streator for a loan of $70,000 on the property of Baker Brothers Company. On June 16th the produce and supply company was informed by a letter from the secretary of the association that the loan would be made upon the property known as the Baker Brothers Company at 519 E. Main Street, Streator, building and warehouse, tracks and all equipment, if the abstract showed a good and merchantable title. The secretary of the association testified that it did not have sufficient funds on hand at the time to make the loan, but could have borrowed whatever balance was necessary. The board of directors never took any official action in regard to making the loan

or in regard to borrowing a portion of the money therefor. No mortgage or note was ever made and no abstract was ever presented to the association for examination of the title, and during the latter part of June, it proceeded to lend its funds elsewhere.

Berrettinni testified that he told Philip Saunders, cashier of the Peoples Trust and Savings Bank, about the negotiations made by him and Scullans for purchasing the Baker building; that they might need five or ten thousand dollars; and that Saunders said he would be glad to take care of them. The record does not show that any further step was taken to procure the loan from the bank.

It appears from the testimony of Berrettinni that he, Scullans, and two others, owned the produce company, which was capitalized at $15,000; that he did not know the amount of the company's indebtedness; that he and Scullans were to take title as individuals; that the company took no action relative to the purchase of the property and made no arrangement to borrow any money for that purpose; that he did not have the funds necessary to pay the purchase price and knew nothing about the finances of Scullans; that they were relying upon the money they expected to borrow from the building and loan association and the bank to pay for the warehouse; but that they were not willing to buy the property unless Baker Brothers Company would agree to stay out of business in Illinois for ten years and would execute said bond for $25,000.

The testimony shows that the warehouse was located on lots 1 and 2. Lot 8 was separated from them by an alley 21 feet wide, and fronted on another street. It appears that lot 8 had been used for some years in connection with the business, but had not been used much recently, and was vacant except for an old small barn and some rubbish and ashes. The testimony as to what property was to be included in the

sale is in conflict. Baker testified that nothing was said between him and plaintiff about trade-marks or brands, or about Baker Brothers Company staying out of the grocery business for ten years, or about a bond; that he never saw the contract which plaintiff executed with the prospective purchasers and did not know its contents before the trial; and that plaintiff was not authorized to execute the same, or to sell any of the property except the warehouse building and site. The written confirmation of June 4th tends to corroborate his testimony. However that may be, the judgment must be reversed for another reason. The record discloses that in order to buy the property, the prospective purchasers relied upon the money they expected to borrow from the building and loan association and the bank. Neither of these prospective loans was ever consummated. The tentative offer of a $70,000 loan by the building and loan association was conditioned upon the showing of a good and merchantable title, but the abstract, which was in plaintiff's possession, was never presented to the association for examination. It is also to be observed that the tentative offer was not made by the association until June 18th, two days after the time had expired in which plaintiff was privileged to make a sale. No definite arrangement was ever made for a loan of a specified amount from the bank or for any specified time. It is not made to appear whether or not the bank would have required security, or whether or not the borrowers would have been able to meet the conditions which the bank might have imposed. The negotiations to finance the purchase were indefinite and uncertain in their terms, and neither of the proposed loans ever ripened into a concrete, definite arrangement. The record fails to show that the prospective purchasers had or could have procured the money to pay the purchase price of $80,000 within the time prescribed, whether the purchase was to be of the warehouse property alone, or of all the property mentioned in

their agreement with plaintiff.

Where a broker is employed to sell property by the owner, if he produces a purchaser within the time limited by his authority who is ready, willing, and able to purchase the property upon the terms proposed by the seller, he is entitled to his commissions, even though the seller refuses to perform the contract on his part. In such case, however, it is necessary for the broker to prove that the purchaser is ready, willing, and able to take the property on the terms proposed. But where the seller accepts the purchaser and enters into a valid contract of sale with him, the broker's commission is earned whether the purchaser subsequently fails to perform his contract and make the payments agreed upon or not. (Fox v. Ryan, 240 Ill. 391.)

It cannot be said that Mr. Baker accepted the purchasers or entered into any contract with them. It was incumbent on plaintiff to show that he produced a purchaser within the prescribed time who was ready, willing, and able to purchase the property on the terms proposed by the owner. This he failed to do. In the absence of such ~~an~~ such a showing, he is not entitled to the commission claimed. The judgment is accordingly reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(65027—1M—9-31)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the [illegible]th day of October, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES L. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

Ill. App. 662

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

CECILE MARTIN, (Plaintiff) Appellee,	:	
v.	:	Appeal from Circuit Court of Kane County.
CABLE PIANO COMPANY, a corporation, (Defendant) Appellant,	:	

Jett, P.J:

An action in assumpsit was instituted by appellee against appellant in the circuit court of Kane County to recover damages alleged to have grown out of a piano sale.

The declaration consisted of the common counts, accompanied by affidavit of claim. Defendant filed a plea of the general issue, with affidavit of merits. A trial was had, resulting in a verdict and judgment in favor of appellee for $490 and costs. To reverse said judgment, this appeal is prosecuted.

Plaintiff's affidavit of claim states that her demand "is for money received by the defendant from the plaintiff on a contract for the purchase of a piano by the plaintiff from the defendant, which contract the defendant repudiated and refused to perform."

Plaintiff, the only witness in her behalf, testified that in May 1924, she purchased of defendant, through J. C. Lawless, its agent at Aurora, a Cable piano at an agreed price of $850; that she made a cash payment of $85.00 and was to pay $21.25 monthly thereafter, and that as she recalled she had made 28 payments, the last being on December 8, 1926.

She further testified that said piano would not stay in tune, sounded flat the most of the time and was unsatisfactory; that in January 1927, she called on Lawless and he stated he had rented this piano out several times and it would not stay in tune;

that an oral agreement was made for the return of the Cable piano whereby she would be allowed $645 therefor "on a Conover that would be $1150 or $1195, to be taken up at some time later. * * * No definite arrangement was made with me, when I was to take the piano. I was going away and he (Lawless) said when I came back, to come in and see him and sign the contract for the new piano." She testified that she next heard from Lawless in December 1927; that he called her up and stated that he would be allowed a bonus if he made a certain number of sales for that year, and he wanted her to sign a contract for a piano which was then in stock; "but that it would not be binding and I would not have to take the piano, and when I was ready to come in he would take me to the Chicago office and I could select any one I wanted;" and that she received from the Cable Piano Company the following letter, dated January 3, 1928:

"Dear Madam:

"We write to thank you for your patronage given our Salesman, Mr. J.C. Lawless, who reports your purchase as follows: Bench, for the total price of $1195.00 on which you have agreed to pay $_____ in cash, and in trade allowance on Former Account valued at $645.00. The balance of $550.00 to be paid as follows: Beginning January 10, 1928, $15.00 per month for 35 months & $25.00 for one month."

Plaintiff further testified that she paid $15.00 in April, 1928 on this last contract, being the only payment she made thereon; that she went to Chicago and called on Mr. Darling, the Company's Credit Agent, and told him Lawless had said that "when I was ready to take up a new piano, he was going to take me to Chicago:" That Darling stated he did not understand it that way, and said "he would sell that piano--it was in the Aurora store--and that when I was ready to take up a new piano to come in and see him personally. * * * He said if I would consider a Mason & Hamlin piano, he would allow the full amount of the payments. I could also have a $1195 Conover."

Plaintiff also testified she next saw Mr. Darling

in September, 1929; that she called "to see about talking up a piano on the basis that he had told me before, and he then said that I did not have that credit on the books; that I had waited too long and that he was going to charge $10 a month rental on the original piano and would only allow me the difference if I took the piano up in two weeks' time, otherwise they would not allow me anything. I did not hear any talk before of rental being charged on the first piano. I did not at any time agree to pay any rental. I asked him how much he would allow me on a Mason & Hamlin and he said they were not handling them any more. He at that time refused to comply with the agreement he had made with me in the fall of 1928."

Plaintiff testified on cross examination that in her conversation with Darling he stated to her that "he would discontinue the notices and I would not have to make any payments until I had taken up the piano, and I said I did not have room for it then and he said to come back when I could take it up, and see him personally, and he would help me select the other piano, a red mahogany."

Q. H. Darling testified that he became acquainted with plaintiff in the fall of 1928, at which time she told him the first piano was returned to the company "because their home was to be broken up and they had no room for it. She did not say anything about the written contract with Mr. Lawless at that time but she wanted to know about getting another piano, and I offered to allow her all the money she had paid on the purchase of the piano, on a style 77 Conover, which sells for $1195, I offered to allow her all the money she had paid and she said she still did not have any place for a piano, but would let me know about it later. * * * We had been agents for the Mason & Hamlin for a great many years * * * and we talked Mason & Hamlin, and I also allowed her on that what she had paid if she would take

a Mason & Hamlin piano. Then she went out and said she would let me know about it later"; that in the fall of 1929 she came in again; that at that time the company was not handling the Mason & Hamlin line, and plaintiff wanted to know if the company would allow to a third person full credit of all sums she had paid on the Cable piano, if she could procure such third person to purchase a Mason & Hamlin; that he informed plaintiff that, as to a third person, they would not allow all that had been paid; that he would allow what she had paid to her but not to a third party, and that she went away.

On cross examination, Darling testified; "On September 7, 1929, the time of my conversation with Miss Martin, I was ready and willing to carry out the arrangement made in the fall of 1928, to allow all she had paid if she bought a Mason & Hamlin or Conover at the price of $1195. * * * I absolutely told her we were ready and willing to carry out the contract."

c Counsel for plaintiff, at the request of the witness Darling, read into the record a letter written by him to plaintiff's counsel. Among other things, this letter stated:

> "I told her (plaintiff) we no longer were the agents for the Mason & Hamlin pianos, but if they would buy a Conover grand piano and it would be a clean deal without any trade-in or discounts, we would allow $385 of the money paid by her. * * This proposition was to remain open until September 21, 1929, and if it was not taken advantage of by that time, the offer would be no longer in effect."

One G. L. Bunt testified for defendant that on May 1, 1928, he succeeded Lawless as defendant's agent at Aurora; that at that time there was "a Conover style 77 grand piano in the Aurora store, marked 'Sold to Miss Cecile Martin.' I had a conversation with Miss Martin. I called her relative to delivery of the piano, - that was in the latter part of May or the first of June 1928. She came to see me at

the store. She said she did not as yet have room for the piano, and would not want it delivered."

The foregoing is in substance the evidence offered by each of said parties. Plaintiff's cause of action, as stated in her affidavit of claim, "is for money received by the defendant from the plaintiff on a contract for a purchase of a piano by the plaintiff from the defendant, which contract, the defendant repudiated and refused to perform." It is obvious that there can be no recovery by the plaintiff in the absence of proof that the defendant repudiated and refused to perform a contract between them.

An examination of the record discloses a total absence of proof of repudiation. There is not even a claim made of repudiation. The plaintiff never made an offer to carry out her part of the contract. It is admitted by both parties that the credit of $645.00 was to be allowed upon the purchase of a new piano. Plaintiff was never ready and willing to buy and accept delivery of a new piano. On the other hand, defendant was never called upon to perform its part of the contract and although it appears from the evidence it was at all times ready to perform its part, the plaintiff would not permit it to do so by failing to provide a place for delivery of a new piano and by making default in payments.

It is a matter of no moment that the piano originally purchased by the plaintiff was unsatisfactory, for she admitted she afterwards came to an agreement with defendant whereby she was permitted to return the piano and be allowed a credit of $645.00 on another piano to be thereafter purchased by her. Defendant did not agree to pay her any cash. It merely agreed to make her a cash allowance for the old piano upon the purchase of a new one. She made a payment on this new agreement and thereafter failed to carry out her part of the

contract. It was she who repudiated the contract and not the defendant. This suit is for a breach of the contract by the defendant. No breach by it was proven. Therefore, no recovery ought to be had in this action. The judgment is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the _____

_____

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty- _____

_____

Clerk of the Appellate Court

(57517—2M—7-27)

Abstract
Motion Filed Nov. 1931

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263 I.A. 663

General No. 8497 Agenda No. 1

April Term, A. D. 1931

A. W. FRANKENFELD, Receiver of H. N. Schuyler State Bank, Plaintiff in error.

vs.

H. H. MOXLEY, E. ULLOM and J. W. CHRISTNER, Defendants in Error.

Error to City Court City of Pana

NIEHAUS, J.

In this case a motion was made by counsel for the plaintiff in the court below, H. N. Schuyler, to strike the transcript of record from the files and affirm the judgment rendered in the court in the city of Pana from which this appeal is prosecuted. The motion was made for the reason that no alleged reason, that no legal connection is shown in the transcript, by the appellee, A. W. Frankenfeld as Receiver of the Schuyler State Bank, with the judgment rendered. Also because the abstract filed does not comply with the requirements of Rule 4 of this court concerning abstracts, and therefore insufficient to entitle the defendant in the court below to a review of the case upon the errors assigned. This motion was taken with the case.

We find on consideration of the matter, that the abstract does not comply with the Rule of this court referred to; and that it is clearly insufficient. The declaration is not abstracted; nor is the notice of special matters of defense

filed in connection with the general issue. The issues for trial are therefore not shown by the abstract.

Error is assigned on instructions given and refused by the court; but no instructions are set forth in the abstract. Error is also assigned because the court entered judgment on the verdict; but the verdict does not appear in the abstract. There are other insufficiencies; but those mentioned are sufficient to show that the abstract does not comply with the rules of this court. It is proper to affirm a judgment when a sufficient abstract that complies with the rules of the court is not filed. **Chicago Record Herald Co. v. Bender Store Fixture Co.** 207 Ill. App. 152.

The judgment is therefore affirmed.

Affirmed.

(Abstract)

Opinion filed 1-14-1931

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263 I.A. 663²

General No. 8505 Agenda No. 4

April Term, A. D. 1931

J. F. LONG, Appellee

vs.

JESSIE RAY and ETHEL RAY, Appellants.

Appeal from McLean

NIEHAUS, J.

This appeal is prosecuted by the appellants, Jessie Ray and Ethel Ray, for reversal of a judgment in the sum of $313.52 rendered against them and in favor of the appellee, J. F. Long, in the circuit court of McLean county, in a suit instituted by the appellee to recover damages alleged to have resulted to him from an automobile collision; and which he avers was brought about by the negligence of the appellants in the driving of their car. The collision occurred on December 23rd 1929 on Route 39, a hard surfaced highway of the state, near the southeast end of Salt Creek bridge, which is located about a mile south of the city of LeRoy in McLean county.

The declaration charges the appellants with general negligence; and avers that the appellee on the day mentioned was driving a DeSoto sedan car with due care and caution for his own safety and the safety of others; and for the safety of his automobile, along and upon the highway mentioned, in a southeasterly direction, in the afternoon of the day mentioned; and that the appellants were possessed of and using and driving

a Chevrolet coupe car along and upon the same public highway in a northwesterly direction; and that the appellants so negligently drove operated and managed their car that it ran into the appellee's car; and caused the damage claimed.

There was a trial by jury, which resulted in a verdict finding the appellants guilty, and assessing appellee's damages at $313.52, upon which the judgment was rendered.

It is contended for reversal of the judgment, that the verdict is against the evidence; that the evidence does not show any negligence on the part of the appellants in the driving of their car; also, that the evidence shows, that the appellee was guilty of contributory negligence.

The record discloses that the persons who drove the respective cars involved in the collision were witnesses and testified in the case, giving their respective versions of how the accident occured; the appellee J. F. Long testified:

"I live at Champaign, Illinois. I am the plaintiff in this case. This accident happened about a mile south of LeRoy on Salt Creek Bridge on Highway 39. I was driving the car. It was about 20 minutes of 4:00. We were going home, my wife and Mr. and Mrs. Streubing were with me. Mr. Streubing was sitting in the front seat with me and my wife and Mrs. Streubing was in the back seat. I was not acquainted with the defendants, Ethel Ray and Jessie Ray. I recognized them as the ladies that were in the accident. Miss Ethel Ray owned the Chevrolet car with which I had the accident. Mrs. Jessie Ray was driving a Chevrolet automobile. This accident happened on the southeast end of the bridge. I was driving a DeSoto coach which I had purchased from Robert Yates. As I started to cross Salt Creek Bridge I slowed down a bit. I could see the defendant's car approaching from the southeast at that time. I saw it before I got to the bridge. As I approached the south end of the bridge the defendant's car swerved across the line several times and then came over to my side and run into the front end of my car, my left side. I was on the right side of the bridge, the southwest

side. The bridge is about 22 feet wide. It is 18 feet between the State Highway Bridge as it enters the bridge and leaves it on the other side. It has concrete banisters on each side. When our car was hit it was so close to the banisters on the right side we could hardly open the door to get my wife out. At that point the bridge is two feet wider than the pavement. I didn't notice whether the impact was a loud one but it jarred us considerably. The impact took place about a car's length from the south end of the bridge. I have driven a car since 1911, and have ridden in a car many times when not driving. I have observed the speed of automobiles. In my judgment the defendant's car was traveling about 30 miles an hour when it struck our car. From the time I first saw the defendant's car until the impact, my car had not been across the black line to the left. The defendant's car struck the left front part of my car. Defendant's car did not travel very far after it hit my car. The left back wheel of the Chevrolet was off the concrete on the southwest. The car was pointing northwest in a diagonal direction, across the pavement, northeast. My car was a new car. I have had it somewhere between two and three months. After the accident I found the frame was bent, the front axle and spring was broke, tire was cut, the front window was broke out, and the fender.

The appellant Jessie Ray testified as follows, in reference to the occurrence:

I was riding with my sister back from Champaign on or about December 23, 1929. We started back from Champaign and get to a point about 27 miles from Bloomington. It was at Farmer City. I had been driving between 20 and 25 miles an hour when we approached the hill. The pavement had snow packed on each side and a great deal of ice on the pavement. We had chains on the rear wheels. My sister-in-law, Ethel Ray, and my two children, Shirley and Catherine, were in the car. As we started down the hill I could see Mr. Long's car as it came around the curve. After we had come down the hill about 50 feet I attempted to turn the car to get on the right. It was in the middle of the road because of the snow. I struck something in the road which started my car skidding to the left. There was a jar. The steering wheel wouldn't take hold. It skidded the car to the left. I applied the brakes gently and they took hold enough to stop it to skid. We gained momentum after we skidded. We kept on coming to the side of the road in a sidewise manner. All the time I tried to get the car on the right side of the road. I wasn't successful soon enough. There was a lot of snow and ice on the pavement at that time. There was a light snow. I don't know whether it snowed or was blown there. I was watching the pavement as I was going down hill before I struck the obstruction. When I struck the object I swayed to the left. I had a hold of the steering wheel all the time trying to hold it to the center of the road. I struck an object about 100 yards from the bridge. I was just beginning to get it back just before we struck Mr. Long's car. I was about 100 yards from the bridge when I first saw the Long car. Before we commenced to skid I think we were going about the same rate of speed. The Long car got to the bridge first. They drove across the bridge before we were hit. We were going about ten miles an hour before the impact. My engine was running. It was not racing. I shut it off. I had my car under control.

A number of witnesses were present and involved in the collision, and they testified to what they saw and heard. The testimony of these witnesses apparently tends to corroborate the appellee. The question of whether or not the appellants were guilty of the negligence charged, or whether the appellee was guilty of contributory negligence, were questions of fact for the jury to determine. We are of opinion that the jury were warranted in reaching the conclusion concerning the issues upon which their verdict was based.

It is also contended that the court erred in instructing the jury that if they found the appellants guilty they should fix the amount of damages at $313.52. There is no error in this feature of the case; as the evidence shows, that the amount referred to was paid by the appellee for the repairs necessary to be made on his car, which was practically a new car; and to put it in the condition it was before the collision. Moreover, the amount of damages was not a controverted question on the trial.

Error is also assigned for the refusal of the court to give the following instruction which was requested by the appellants:

The jury are instructed that the plaintiff is required by law to establish his case by a preponderance of the evidence before he can recover. If the plaintiff has not so established his case, or if the evidence is evenly balanced so that you are unable to say on which side is the preponderance, or if the preponderance is in favor of the defendants, then in either of these cases you should return a verdict of not guilty.

While it is true that this instruction correctly states the law, it was nevertheless properly refused, because the point involved in the instruction concerning the preponderating evidence necessary before a recovery could be had is repeatedly stated in other instructions which were given for the appellant.

We find no error in the modification or refusal of any of the instructions. The record does not disclose any reversible error, and the judgment is therefore affirmed.

Judgment affirmed.

Opinion filed Nov 4-1931
Petition denied Jan. 7-1932

Tabet

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263 I.A. 663[3]

General No. 8508 Agenda No. 7

April Term, A. D. 1931

JOHN E. BARBER, Administrator of the Estate of John Elmer Barber, Deceased, Appellant.

vs.

FRANCIS THATCHER and DEAN DICKERSON, Appellees

Appeal from Coles

NIEHAUS, J.

This suit was brought in the circuit court of Coles county by the appellant John E. Barber as administrator of the estate of his deceased son, John Elmer Barber for the benefit of the next of kin of the deceased, to recover damages from the appellees, Francis Thatcher and Dean Dickerson, for alleged pecuniary loss sustained by the next of kin of the deceased in his death, which appellant charges was caused by the negligence of the appellees.

The deceased was a boy over seven years of age at the time of his death; and his death resulted from injuries received by being run over by an automobile driven by the appellee Francis Thatcher, while the boy was attempting to cross Cedar street, a residence street in the city of Mattoon. There is little dispute about the circumstances under which the fatal injuries to the boy occurred. It appears from the evidence that the appellant John E. Barber, who resides in Moultrie county, came to the city of Mattoon with some of the members

of his family including his son John Elmer, the boy mentioned, on or about the 7th day of August in a Ford touring car, to visit his sister Mrs. England, who, resided at 3016 Cedar Avenue; and when he reached his sister's residence he parked his car on the opposite side of the street, the proper place to park it. After visiting his sister, the appellant accompanied by his brother, Arthur Barber and his son John Elmer, and two of his nephews, Donald and Everett England, recrossed Cedar Avenue to the place where his car was parked, for the purpose of fixing the foot brake of the car. That after appellant had started to work on the foot brake of his car, a truck used and operated in the business of the appellee Dean Dickerson and driven by an employe drove up and stopped alongside and parallel with the car of the appellant; and the driver of the truck engaged in conversation with Everett England, appellant's nephew, who was standing near the appellant's car; thereupon another automobile driven by Mrs. John R. Hamilton, drove up and stopped in the rear of appellee's truck. In this situation, appellant's son John Elmer suddenly took a notion to cross the street; going through the space between the front of the Hamilton car and the rear end of the truck mentioned. As he emerged from behind the truck, he happened to step directly in front of an approaching car driven

by the appellee, Frances Thatcher, and was knocked down and run over, and thereby suffered fatal injuries, which were the cause of his death.

The declaration charges, that the appellees Francis Thatcher and Dean Dickerson, jointly contributed to causing the death of appellant's deceased son; that the driver of the Dickerson truck was negligent in stopping the truck alongside the appellant's car because it was a violation of a city ordinance of the city of Mattoon, which provides, that "there shall be no parking of cars in double rows along any street," in the city; and that because, by stopping in the manner stated "the truck obstructed the view and vision of the drivers of other vehicles approaching and passing along said street; and also obstructed the vision of pedestrians crossing or walking upon said street at the place referred to, so that they could not see approaching vehicles: and that the appellee Thatcher was negligent in driving his automobile along Cedar street at the place where it struck appellant's deceased son at a rate of speed greater than was reasonable and proper having regard to the traffic and the use of the way; and at a speed to endanger the life and limb of other persons passing along and upon the street" in question.

The only controverted question of fact in the case is the speed at which the Thatcher car was driven when it struck

the deceased. A number of errors are assigned for reversal of the judgment, namely, the court admitted incompetent evidence on the trial; and that some of the instructions given at the request of the appellees are erroneous; also that the verdict of the jury finding the appellees not guilty, is against the weight of the evidence. The errors assigned concerning the admission of incompetent evidence for the appellees has reference to an ordinance of the city of Mattoon for the regulation of the traffic on the public streets of the city, which was admitted in evidence by the court over appellant's objection. This ordinance provides that no person shall adjust or repair automobiles or motor cycles while standing on public streets of the city except in cases of emergency. This evidence was introduced for the purpose of showing that the appellant was violating the ordinance referred to, in repairing the foot brake of his automobile: but the violation of the city ordinance had no bearing upon or contributed in any way to cause the injuries to appellant's son. Nor was this evidence pertinent to any of the issues in the case. The issues to be passed upon by the jury were whether the appellees were guilty of the negligence charged in the declaration and whether or not appellant's son was exercising that degree of care and caution for his own safety which a child of his age experience and intelligence can be reasonably expected

to exercise under the circumstances prevailing at the time of his injury. This evidence was incompetent under the issues and may have had prejudicial effect on the jury.

Concerning the errors assigned on the instructions given for the appellees, it may be said, that in the second instruction the jury were told, that they should find for the appellees unless they believed that the appellant, who was the father of the deceased, 'if by the use of ordinary care and caution for the safety of the appellant's son at and immediately prior to the time of his fatal injury would have saved the life of said John Elmer Barber, and that his said father did not use for the safety of said son a degree of care that an ordinary prudent person could have used under the same circumstances; and that as a proximate consequence thereof, the said John Elmer Barber was killed; or if they believed that said son at and immediately prior to the time of the fatal injury did not use for his own personal safety that degree of care which a child of his age capacity intelligence discretion and experience would have used under the same circumstances and as a proximate consequence thereof was killed,' then even though they might believe from the evidence that the defendants were both negligent as charged in the declaration or some count thereof, then your verdict should be for the defendants.

In the third instruction given for the appellees the jury were told, 'that before the appellant could recover, he must prove "by a preponderance of the evidence at and immediately prior to the time of the fatal injury, the appellant as father of the deceased son was in the exercise of due care for the safety of the son; and also the said son at the time of the injury was in the exercise of the degree of care and caution for his own personal safety which a person of his age capacity intelligence and experience would have exercised under the same circumstances.'

By the sixth instruction given at the request of the appellee Thatcher, the jury were told that "if they believed from the evidence that the appellant's son was at the time of his death an infant of the age of seven years and less than eight years and was in charge control and custody of his father at and immediately prior to the time of the fatal injury,' then unless his father the plaintiff in the case "has proved to you by a preponderance of the evidence in this case that at and immediately prior to the time of the collision the said father the plaintiff was in the exercise of due care for the safety of said John Elmer Barber, your verdict should be for the defendant."

The record does not disclose any evidence upon which to base the foregoing instructions insofar as they refer to the

questions of care and caution to be exercised by the appellant as father of the deceased son; nor does it disclose any neglect of duty by the appellant as father that had any bearing upon the issues involved in the case; nor any evidence of any negligence on the part of appellant that contributed to bring about the fatal injuries to his son. These references therefore, in the instructions concerning the care and caution to be exercised by the appellant his father were irrelevant to the issues submitted to the jury for consideration and determination, and raised a false issue in the case and were therefore erroneous; and other instructions contain the same error.

For the errors indicated, judgment is reversed and the cause remanded.

Reversed and remanded.

Abstract

Opinion

54 F

263 I.A. 663 24

General No. 8522 Agenda No. 18

April Term, A. D. 1931

INDEPENDENT BOTTLE CO., A Corporation, Appellee

vs.

HENRY M. SCHOEN, doing business as "Bottlers Supply Co.," Appellant.

Appeal from County Court Sangamon County

NIEHAUS, PJ.

In this case an appeal is prosecuted from a judgment for $191.15 recovered by the appellee, Independent Bottling Co., in the county court of Sangamon county against the appellant Henry M. Schoen. The appellant's contention is, that the county court erred in refusing a new trial for the following reasons:

First. No foundation was made proving the loss of the ledger sheet and that a search had been made which would allow the introduction of the Bill of Particulars on any theory that it was a copy or secondary evidence.

Second. There is no proof as to the market value of the merchandise alleged to have been ordered and delivered.

Third. Plaintiff's Exhibits which were sent to jury room and used as evidence in this case were never admitted by the Court.

Fourth. The Court instructed the jury that the plaintiff could prove his case by a preponderance of the evidence. Although but slightly.

It must be pointed out in connection with the errors above assigned, that the abstract does not show that the bill of particulars mentioned in the first paragraph was

introduced in evidence; nor is the bill of particulars abstracted. This court therefore is not in position to review this alleged error.

Concerning the error assigned in the second paragraph, namely: That there was no proof made "as to the market value of the merchandise alleged to have been ordered and delivered," it is sufficient to say, that such proof under the issues would not have been competent, inasmuch as the claim of the appellee was for merchandise sold and delivered to the appellant at a fixed price.

In the third paragraph of the assigned errors the appellant makes the point, that the plaintiff's exhibits which were sent to the jury room and used as evidence, were never admitted by the court, as evidence; but the exhibits referred to, do not appear in the abstract; nor does the abstract show, that they were sent to the jury room. The court therefore cannot give consideration to this assignment of error.

The fourth paragraph assigns error in the giving of an instruction concerning the preponderance of the evidence; but inasmuch as the abstract does not set out all the instruction given in the case, we cannot intelligently review the legal propriety of giving the instruction referred to.

The evidence contained in the abstract on the material questions in the case, although involved in much contradiction by the testimony of the respective parties to the suit, and their respective witnesses, nevertheless warranted the jury in the conclusion, that the appellee had proven his case by a preponderance of the evidence; and in returning a verdict in favor of the appellee upon which the judgment is based. In this situation the judgment should be affirmed; and the judgment is affirmed.

Judgment affirmed.

Opinion filed [illegible]

Opinion also [illegible] modified on rehearing and filed, [illegible]

General No. 8525 Agenda No. 21

April Term, A. D. 1931

JOHN GREENLEAF, Appellee

vs.

CLARK COX and PIERSON-HOLLOWELL WALNUT Co., Inc., Appellants.

Appeal from Hancock

NIEHAUS, P. J.

This appeal is prosecuted from the judgment in the sum of $425.36 rendered in an action of trover in the circuit court of Hancock county, against the appellants, Clark Cox and the Pierson-Hollowell Walnut Co.

The record discloses concerning the facts, that John Greenleaf a farmer residing near Camden, Illinois, in September, 1929, bought some walnut trees, which with the assistance of one Fred VanWinkler he cut into forty three logs. Afterwards the logs were hauled to a side track and on the right of way of the C. B. & Q. Railroad in Rushville; and were there piled on the right of way, near the side track mentioned. The appellee Greenleaf testified, that he hired his nephew Sterling Greenleaf to haul the logs to the side track of the railroad and paid him $82.00 therefor; and that he had finished the job about the first of February, 1929. That when he went back on March 27th following, to the place where the logs had been piled, the logs were gone. The evidence discloses that Sterling Greenleaf, who had hauled

the logs to the C. B. & Q. side track, sold the logs to the appellee Cox for the sum of $350.00; and that Cox afterwards resold the logs to a representative of the appellant Pierson-Hollowell Walnut Co. of Danville, Illinois, and that thereupon the logs were transported to Danville and sawed up and utilized by the appellant last mentioned in their business.

It is contended by the appellants, that they are not jointly liable for the conversion of appellee's property; but it is apparent, that it was by the combined acts of both appellants that the appellee was deprived of his property. The appellant Cox who first obtained possession of the logs, resold them to the appellant Pierson-Hollowell Walnut Co., which company caused them to be removed from the place where the appellee had placed them, and to be transported to its own place of business in Danville, and there utilized and appropriated the logs for the purposes of their business. The Walnut Company thereby destroyed the identity of the logs and put it out of the power of the appellee to regain possession of them. Under these circumstances we conclude a legal basis was established for joint liability to the appellee.

It is also contended by the appellants that the court erred in giving plaintiff's instruction, numbered 8, for the reason

as stated by them that "there is not a word in the instruction about it being necessary for the jury to find from the evidence that the logs belonged to the plaintiff; or that he was entitled to their possession." It is true that the element of ownership in the appellee pointed out, should have been included in the instruction; but inasmuch as a number of instructions given for the appellee, and also for the appellants, emphasized the necessity of making this proof by a preponderance of the evidence, we conclude that the appellants were not harmed by the omission; especially since the proof showing the appellee's ownership of the forty three logs in question was practically conclusive.

The record does not disclose any reversible error, and the judgment is therefore affirmed.

Judgment affirmed.

(Abstr. 4)

56

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263 I.A. 664

General No. 8531 Agenda No. 24

April Term, A. D. 1931

WILLIAM DYER, Appellee.

vs.

INSURANCE COMPANY OF NORTH AMMERICA, Appellant.

Appeal from McLean

NIEHAUS, P. J.

In this case an appeal is prosecuted by the Insurance Company of North America from a judgment of $353.00 rendered against it in the circuit court of McLean county, and in favor of the appellee William Dyer, in a suit by the appellee against the appellant company on an insurance policy issued to the appellee by the company, insuring appellee's Chevrolet automobile against loss by fire or theft, to recover damages sustained for the loss of his automobile by theft and fire.

There were no written pleadings in the case; it having been brought into the circuit court on an appeal from the judgment of a justice of the peace; however, the issues involved in the trial in the circuit court are not disputed and the appellant states them to be as follows:

"During the course of the trial defendant contended that the policy sued on was void because of a provision in the policy which expressly declared the policy void in event that other insurance should attach to the same property, and the defendant showed that at the time of the loss the plaintiff, William Dyer, carried full insurance against a fire and theft loss on the same car in the two companies mentioned, the General Exchange Insurance Corporation and the Insurance Company of North America.

Plaintiff contended that the appellant, the Insurance Company of North America, had waived that provision in the policy and that appellant's agent knew of the first policy at the time the second was issued. This the appellant's agent denied."

There was no controversy about the fact that the appellee had two insurance policies on his automobile; one in the General Exchange Insurance Company, which was furnished him by the Finance Company through which he had financed the purchase of his automobile; and the other being the policy in controversy. There was a controverted question about the question of fact and of law in reference to the alleged waiver of a condition of avoidance in appellant company's policy, which provides, that 'no recovery shall be had under the policy if at the time a loss occurs, there is any other insurance on the automobile.'

Whether or not there had been any waiver of the condition in the appellant company's policy referred to by its agent who, as the record shows, was invested with power and authority to sell insurance and collect the premium due therefor, was a controverted question which was a matter of evidence; and involved the testimony of the appellee and the appellant's agent.

The appellee Dyer testified concerning this matter of waiver as follows:

"I was the owner of a Chevrolet coach, 1928 model, purchased on March 16, 1929, from Tracy Green company. This car was purchased on the finance plan and the finance company furnished me with a policy of insurance. Plaintiff's Exhibit

A-1 is the policy that they issued. I had taken this policy and told Mr. Havens I had a policy for fire and theft with the Finance Trading Company, but I wanted liability and property damage and collision. He said, "that isn't worth much to you; that is more for their benefit than yours; I will give you full coverage on yours." I said, "About what will that cost?" And he said, "Around twenty-four to twenty-eight dollars." Later on the policy came to me through the mails. I finally paid for it in full.

Q. Now, tell the jury, if you know, where Mr. Havens was during this conversation you had with him; was Havens in the office?

A. With Mr. Havens himself; he marked a tab of it and I went to work.

Q. Where did he get the information to be used in that policy?

A. Taken it off that General Motors there.

Q. Off of Plaintiff's Exhibit A-1?

A. Yes, sir."

The testimony of appellant's agent in reference to the same matter is as follows:

"My name is J. B. Havens. I write general insurance and represent the Insurance Company of North America. On or about April 20, 1929, I issued a fire, theft and collision policy of insurance to William Dyer on a 1928 Chevrolet coach.

I recall the occasion when Mr. Dyer asked for this insurance, but I cannot recall the conversation.

Q. I will ask you whether or not, Mr. Havens, at the time the insurance policy, which is marked "Plaintiff's Exhibit A-2" was issued by your agency you had knowledge of other insurance on the same automobile carried by this plaintiff?

A. No.

Q. At the time you issued the policy did you take the numbers to be used on your policy, the motor numbers, from another policy tendered to you by the plaintiff?

A. I can't answer that. I didn't knowingly take them from another policy. If I took them from another policy I didn't know it was upon a policy.

Q. And you had no knowledge at all that he had other insurance on this car?

A. No."

On cross examination the agent Havens further testified:

"Q. You wouldn't say, Mr. Havens, you didn't take it from Plaintiff's Exhibit A, would you? (Referring to information contained in policy)

A. I can't answer how I took them.

Q. I say you wouldn't say you didn't take them from that?

A. I couldn't answer that.

Q. What is your recollection about it?

A. I don't remember, Loren; it is too far away.

Q. So, you don't want to say one way or the other?

A. No, I don't think I do. I have no recollection of just what I took the numbers from."

It is evident, that whether or not there was a waiver of the conditions referred to in appellant's insurance policy, involved a determination of the respective credibility of the two witnesses referred to; of which the jury were the sole judges; and it is evident from the verdict, that the jury reached the conclusion, that the appellee gave them the true version of the transaction between the appellee and appellant's agent; and which resulted in the issuance of the insurance policy in question by the appellant company. Under these circumstances this court would not be justified in holding, that the jury should have believed the testimony of appellant's agent instead of the testimony of the appellee. And the law is well settled, that 'an agent clothed with power to act for a company in business transactions is treated as authorized to bind it in all matters within the scope of his real or apparent authority.' **Phoenix Ins. Co.** v. **Hart** 149 Ill. 513. This is the law, even though there is a special limitation on the power and authority of the agent in the provisions of the policy. **Bennett** v. **Union Central Life Ins. Co.** 203 Ill. 439. A provision in an insurance policy to the effect that there shall be no waiver of the condition or provision of the policy unless such waiver is written upon it or attached to the policy, is a condition in-

serted for the benefit of the insurance company; and is itself subject to waiver. **Phoenix Ins. Co. v. Hart supra; Phoenix Ins. Co. v. Grove** 215 Ill. 299.

The appellant company also raises a question about the correctness of the court's ruling in sustaining an objection to an offer to prove, that sometime prior to the present loss occurrence, the insurance company of North America paid a theft loss of $50.00 to the appellee; and that at approximately the same time the General Exchange Ins., Corporation paid a similar loss sustained by the appellee. We are of opinion, that the ruling of the court was not erroneous, because the proof offered had no bearing on the real issue involved in the trial, namely, whether or not there had been a waiver of the avoidance condition in the policy; and the proof, if admitted, would have had a tendency to raise false issue in the case.

The record does not disclose any reversible error, and the judgment is therefore affirmed.

Judgment affirmed.

Opinion filed

574

263 I.A. 664[3]

General No. 8536 Agenda No. 28

April Term, A. D. 1931

RUTH LONG, Appellee,

vs.

REVIEW PUBLISHING COMPANY, Appellant.

Appeal from Macon

NIEHAUS, PJ.

This suit was commenced in the circuit court of Macon county by the appellee Ruth Long against the appellant Review Publishing Company, to recover damages for personal injuries sustained by her on Nov. 12, 1929, as the result of the alleged negligence of the appellant.

The declaration alleges, that the appellee by the invitation of Edna Sollars with the knowledge and consent of appellant accompanied Edna Sollars, a blind special feature writer and news correspondent of the appellant, on a trip in appellant's car, driven by its servant and employe, which was undertaken at the instance and request of the appellant to the vicinity of Moweaqua, Illinois, for the purpose of assisting appellant's blind feature writer to obtain information for writing certain articles to be published in the appellant's newspaper; and that while thus riding in appellant's automobile and while in the exercise of due care for her own safety, the appellant's servant who was driving the automobile on the hard road at a point about three miles south of Moweaqua, drove it so carelessly and im-

properly, that it ran off the hard road, and was turned over thereby, in consequence of which she was greatly injured.

There was a trial by jury in the court below, which resulted in a verdict and judgment for $5200.00; and this appeal is prosecuted from the judgment. The main contention of appellant for reversal of the judgment concerns the instructions given for the appellee. The first of these upon which error is assigned containing several pages of a verbatim narrative of the matters and charges contained in the declaration, are couched in the verbose and complex language of common law pleadings; and many of the matters recited are argumentative and immaterial in character concerning the involved questions in appellee's right to recovery. While it is important that the issues to be determined by the jury should be explained to the jury, they should be stated clearly and concisely; and all charges to be disregarded should be eliminated. **Dixon v. Swift** 238 Ill. 52. Although the mere fact, that allegations of the declaration are contained in an instruction does not render it objectionable, nevertheless it is pointed out in **Rewitz v. Chicago Transit Co.** 327 Ill. 212 that "the incorporation into an instruction of the declaration with all its charges, some of which, after proof may be disregarded, "tends to confuse the jury. Furthermore, "from the reading of several pages of instructions of this type involving a statement of detailed allegations, the jury

may get the impression that the court is in fact saying what has been proved."

While instructions similar to the one complained of have been repeatedly criticised and condemned, the giving of such an instruction does not necessarily involve reversible error; and we are of the opinion that in this case, in view of the evidence and the other instructions given, that the giving of the instruction referred to was not reversible error.

Error is also assigned on the modification by the court of the twelfth instruction requested by the appellant and given. In this instruction the jury were told, that the appellant would not be liable if appellant's automobile unexpectedly skidded because of the dirt or debris on the road, if the appellant did not know of the existence of the dirt or debris. The Court modified this instruction by adding and inserting the words, "or by the exercise of reasonable care could not have discovered said condition." The modification was proper except for the use of the word "could" insteal of "would". The use of the word "could" instead of "would" has been held to be erroneous. **Gehrig v. C. & A. R. Co.** 201 Ill. App. 613; **Moody v. Peterson** 11 Ill. App. 195. On the measure of damages, the court gave the following instruction:

"The Court instructs the jury that if you find the issues for plaintiff and against the defendant, then you should further, by your verdict, assess the plaintiff's damages at whatever sum you may believe from a preponderance of all the evidence in the case will compensate her for the injury sustained by her."

This instruction does not require the assessment of damages to be based upon evidence as to damages for which the law allows recovery and is therefore erroneous. **Illinois Central R. R. Co. v. Johnson** 221 Ill. 42; **Garvey v. Chicago Rys. Co.** 339 Ill. 276.

Concerning the matter of the damages to be recovered, the record discloses that some time after the commencement of this suit and the filing of the declaration therein containing the allegation in reference to the injuries suffered by the appellee for which she claimed the right to recover damages, the declaration was amended by adding an allegation that the appellee "sustained injuries to her heart which caused the same to become diseased and enlarged." On the trial, over the objection of the appellant, the appellee was allowed to testify about the condition of her heart at that time; and made the following statement: "I have intense pain, and smothering, and once unconsciousness. I suffer in my heart. I first noticed the trouble some time in the spring; this last spring.

No doctor was called at that immediate time. Later on,

when I fell unconscious. That was at Assumption. Dr. Zobrist was called; Dr. Zobrist treated me two times; the first time was the 8th of August and the second time was about two weeks later, of the present year; I have had an examination by Dr. Cecil Jack in regard to the matter; * * * I have never had any trouble with heart before the automobile turned over." This evidence was competent if the appellee, by proper proof, had connected the heart injuries testified to with the automobile accident and Dr. Zobrist and Dr. Jack were called as witnesses for that purpose, but their testimony does not show that the condition of the heart or the heart trouble complained of by the appellee resulted to the appellee from the accident; and upon the conclusion of the evidence in the case the court therefore struck out the testimony of these witnesses.

It is apparent, that in this situation, concerning the assessment of damages for appellee, under the instruction above referred to, the jury might consider the evidence of the appellee concerning the heart trouble testified to by her, although there was no evidence to show that she suffered it in consequence of the accident. The giving of the instruction therefore, was clearly prejudicial to the appellant on the question of the assessment of the damages; and reversible error.

For the reasons herein stated, the judgment is reversed and the cause remanded.

Reversed and remanded.

Abstract
Opinion filed Nov 4

58 A

263 I.A. 664

General No. 8515 Agenda No. 12

April Term, A. D. 1931

ADOLPH A. SCHOEN, Appellee,

vs.

HENRY WOLFSON, Appellant

Appeal from Circuit Court, Sangamon County.

ELDREDGE, J.

As a result of an automobile accident Adolph A. Schoen, appellee, and also his wife, Marguerite Schoen, each brought an action to recover for personal injuries against appellant. Henry Wolfson. By stipulation of counsel in the Court below both cases were heard at the same time, upon the same evidence and by the same jury. In the case of appellee the damages assessed were $1800.00. The appellant has prosecuted a separate appeal in each case. We have discussed the errors assigned in the case of Marguerite Schoen v. Henry Wolfson in an opinion filed at the same time that this opinion is filed. All the errors assigned on this appeal were assigned on the appeal in the other case, therefore it is unnecessary to repeat our conclusions on the appeal in this case but reference to the opinion filed in the case of Marguerite Schoen v. Henry Wolfson is hereby made.

We find no reversible error in the record and the judgment of the Circuit Court is affirmed.

abst

abst

Opinion filed Jan 4-1932.

Petition for rehearing filed Jan 7-1932

517

263 I.A. 664

General No. 8518 Agenda No. 14

April Term, A. D. 1931

FLORENCE O. MINER, Appellee,

vs.

ETHEL CRISPIN, Appellant, FRANK BISHOP

Appeal from Circuit Court, Vermilion County.

ELDREDGE, J.

Florence O. Miner, appellee here and plaintiff in the Court below, obtained a judgment against Ethel Crispin and Frank Bishop, defendants, in the sum of $1500.00 in an action on the case to recover damages for injuries received in an automobile accident. Ethel Crispin alone appeals from the judgment. The amended declaration consists of two counts, the first of which charges general negligence on the part of Mrs. Crispin and Mr. Bishop whereby the plaintiff was injured while riding as a guest in an automobile driven by Mrs. Crispin. The second count charges that Mrs. Crispin drove her automobile at a speed greater than was reasonable having regard to the traffic and the use of the way, that Bishop drove his car ahead of her in a careless and negligent manner and that by reason of the negligence of both defendants the plaintiff was injured while she was a guest riding in an automobile driven by

Mrs. Crispin. Each defendant filed a separate plea to the declaration.

Mrs. Miner and Mrs. Crispin both resided in Danville, Illinois, and on the morning of April 12, 1930 Mrs. Crispin with Mrs. Miner and another friend, Mrs. Gannon, who also resided in Danville, started in an automobile driven by Mrs. Crispin for the city of Bloomington. Mrs. Miner sat in the front seat with Mrs. Crispin while Mrs. Gannon sat in the back seat of the car. They left Danville at nine o'clock in the morning and arrived at Farmer City at 10:40 o'clock, a distance of sixty-two miles. They left Farmer City at about eleven o'clock and travelled over the state highway which was a straight, level, concrete road 18 feet wide with the usual gravel shoulders and shallow ditches on either side. After they had travelled about five or six miles northwest of Farmer City they approached another automobile apparently going in the same direction and on the right side of the road driven by the defendant Bishop. When they first discovered the Bishop car the evidence tends to show it was about 500 feet in front of them. It appears that Bishop had stopped his car and was backing toward the approaching car driven by Mrs. Crispin. Mrs. Crispin testified that she did not see Bishop's car until she was within two or three car lengths

of it. There is a conflict in the evidence as to the rate of speed Mrs. Crispin was driving. Mrs. Miner had previous to this time suggested to Mrs. Crispin that it was not necessary to drive so fast. Mrs. Crispin testified:— "When I first noticed the other car I would say it was two or three cars away, automobile lengths, I would say it was that much. The car was on the pavement backing when I saw it. I didn't see it drive in; it was in motion when I first saw it; I don't know whether there was anything to prevent me from seeing it until I was in two or three car lengths. We were driving along in a leisurely way, looking at the land marks as Mrs. Miner pointed them out, and conversing. I would say we drove up within 4 or 5 lengths of this other car before I saw it. Heard Mrs. Gannon say 'stop' two or three times; that was after I had seen the car. We were two or three car lengths of that car which was backing up when we first saw it, and while she was saying 'stop, aren't you going to stop,' I was doing everything I could. My thought was first to stop, but I felt if I could get around the car that was the best thing to do. We were practically on to the car when she told me. I was thinking about the speed of the car at the particular time because I know I wasn't driving fast; I was paying attention to my rate of speed just before Mrs. Gannon said 'stop, stop,' and Mrs. Miner said, 'there is a car,' or something to that effect. I was on the right side of the black line when we saw the car, when I first thought I could go around it, and I started to the left; I was on the right hand side of the black line when the accident happened; was on the left side of the road when the accident happened."

There was no obstruction impairing the view of Mrs. Crispin and it is apparent that she was occupied in looking at the scenery and conversing with her friends and paid little attention to Bishop's car until too late to avoid crashing into the rear thereof. The evidence tended to show that after the accident Mrs. Miner made statements to several witnesses to the effect that the accident was not the fault of Mrs. Crispin. To one of these witnesses she stated that she was afraid Dr. Crispin, the husband of Mrs. Crispin, "would jump all over Mrs. Crispin and she felt very bad about it, * * * * that she felt worse about this

than she did her own injuries; [illegible] that she told him not to blame her, it wasn't her fault." The plaintiff offered and the Court gave an instruction to the effect that even if the plaintiff had made such statements nevertheless if the jury believed from a preponderance of the evidence that at and just before the time and place of the accident she was exercising ordinary care for her own personal safety and that the defendants were each then and there guilty of a lack of due care in the operation of their automobiles as charged in the declaration, and she was injured and sustained damages through their negligence in the operation of their automobiles, then the plaintiff's right of recovery would not be defeated by any such statements no matter whether made after the accident or while she was in the hospital. The giving of this instruction is assigned as error on the ground that it calls attention to particular facts in the case and is argumentative in form. Even if it is subject to these criticisms it could not have harmed appellant to any extent and under the facts in this case the error, if any, is not of sufficient gravity to cause a reversal of the judgment.

It is next urged that a new trial should have been granted because the verdict is manifestly against the weight of the evidence. We cannot sustain this contention.

The point is also raised on this appeal that the plaintiff cannot recover because she and Mrs. Crispin were engaged at the time of the accident in a joint enterprise. This defense was not raised in the Court below and is advanced in this Court for the first time. However, the plaintiff and defendant were not engaged in a joint and common enterprise because they were not both jointly operating or controlling the car in which they were riding and it has been held that where one person invites another for a pleasure ride, the two are not engaged in a common enterprise or joint adventure. (Berry on Automobiles, 3rd Ed. Sec. 517.)

The last contention of appellant is that the verdict is excessive. The evidence shows that as a result of the accident that plaintiff's patella, or knee cap, was broken and that she was still suffering pain on account thereof at the time of the trial, that she received a cut over and across her left eye requiring sixteen stitches; that she has headaches and pain in the eye; that it left her very nervous; that she was confined over two weeks in the hospital and in bed at home for six weeks during which time she was compelled to pay for a housekeeper at the rate of $15.00 per week to take care of her home and children; that her hospital bill was $108.02. Under these circumstances we cannot say that the

verdict is excessive.

There is no reversible error in the record and the judgment of the Circuit Court is affirmed.

Affirmed.

(Abstract

Opinion filed Nov. 1, 1931

4

263 I.A. 665

General No. 8534 Agenda No. 26

April Term, A. D. 1931

LEROY KRING, Appellee,

vs.

H. W. FUNK, Appellant.

Appeal from Circuit Court, McLean County

ELDREDGE, J.

This case originated before a Justice of the Peace and on an appeal to the Circuit Court appellee recovered a judgment against appellant in the sum of $117 as damages to his automobile caused by a collision with the automobile driven by appellant. The accident occurred on state highway No. 2 a few miles north of the limits of the City of Normal in this State. Appellee with his wife and a guest passenger had been in the City of Bloomington to do some shopping and at the time of the accident was driving north on the right side of state highway No. 2 toward the City of El Paso. Near the place of the accident a road enters the state highway from the west but does not cross the same. About forty feet south of this road another road enters the state highway from the east but does not cross the same. Appellant came east on the road entering the state highway on the west and drove south on the state highway for about forty feet until he came opposite the road

entering the state highway from the east when he turned left or east to cross the state highway to enter the other road. He saw the automobile of appellee approaching him from the south and thought he had time to cross the highway in front of it, but unfortunately the latter car struck the rear end of appellant's automobile causing the damages complained of. The only error assigned is that the verdict is contrary to the manifest weight of the evidence. The contention of counsel for appellant is that appellee had ample time to have avoided the injury by turning his automobile to the left and passing around the rear of the one driven by appellant and was guilty of contributory negligence. These questions of fact were for the jury to determine.

As stated above the entire argument of counsel for appellant is based upon the facts and not a single reference is made to the abstract where such facts may appear. This is a violation of Rule Five of this Court and for this reason alone the judgment might be affirmed but as the evidence in this case was brief and the abstract thereof consequently short we have examined the same and considered the point raised and find that there is ample evidence to sustain the verdict of the jury.

The judgment of the Circuit Court is affirmed.

Abstract.
Filed Nov 1 1931
On [illegible]

61

263 I.A. 665

General No. 8484 Agenda No. 40

October Term, 1930

LINCOLN PARK COAL & BRICK CO., an Illinois Corporation for the use of The United States Fidelity and Guaranty Company, Appellant,

vs.

WABASH RAILWAY COMPANY, a Corporation Appellee

Appeal from the Circuit Court of Sangamon County

SHURTLEFF:

This case has been before this court twice heretofore and once on pleadings before the Supreme Court. For a statement of the facts in connection with this case, reference is had to **Lincoln Park Coal & Brick Company, plaintiffs in error, v. Wabash Railway Company, defendant in error,** 246 Ill. App. 632; and the same cause in 338 Ill. 82. Two juries have passed upon the facts in this case and upon each trial found a verdict for appellee. We subjoin appellant's statement of the case in this cause as it has a particular bearing upon the issues presented to the court on this review, as follows:

"This case comes before this court for the third time. On the first review a question of instructions as to the law was involved. This court set aside the findings of the jury and remanded the case for a new trial. The next time this case appeared before this court the sufficiency of the declaration was involved. This question was appealed to the Supreme Court and finally in July of this year the case was again tried before a jury and the case now comes before this court for the third time and involves the instructions given the jury by the Circuit court."

The facts as appear in the record on the trial of this case are practically identical with the testimony given on the first hearing. The main point in controversy is, the duty which the railroad company owed the employes of its shippers. There is little or no controversy in the testimony. The facts are substantially as follows:

"On January 14, 1925, a man by the name of Charles T. Hale was employed by the Lincoln Park Coal & Brick Company, an Illinois corporation. It was the duty of Hale on that date to supervise the loading of coal from wagons driven by the teamsters for the Lincoln Park Coal & Brick Company into and upon coal cars located upon a switch track of the Wabash Railway Company. On the day in question, as Hale got on the car to spread the coal so that additional materials might be placed upon the car, he was thrown backwards by the jar of the engine coupling to cars, which cars bumped into the car upon which Hale was climbing. The engine belonged to and was operated by the Wabash Railway Company. Hale was pinned beneath one of the wheels of the car from which injury he died on the way to the hospital.

"The United States Fidelity and Guaranty Company carried a compensation policy of insurance upon the employes of the Lincoln Park Coal & Brick Company and after the death of Hale, his widow, Loretta Hale, applied to the Industrial Commission for recompense for the death of her husband and was awarded $3,199.04, on which sum the United States Fidelity & Guaranty Company has been paying monthly. The facts in this case are identical with the facts appearing before this court at the October Term, 1926. In substance they are: The Wabash Railroad Company placed two cars upon their switch track between Capitol Avenue and Jackson street on Tenth street, in Springfield, Illinois; that one of these cars was completely loaded and the other car was almost loaded; that

E. C. Shadow, the switchman for the Wabash Railroad Company, told Hale they were going to bring him some additional cars. After that the Wabash brought two cars in and switched them upon the side track to within a few feet of where the original cars were setting; that the train crew then switched some cars upon another track and while Shadow was riding the cars in on the other track he saw the switch engine again coming upon the track wherein the cars were located upon which Hale was working; that this was some twenty or thirty feet from where Shadow was and he hollered to Hale, 'look out, boys, they are coming in right now;' that he did not look to see whether Hale heard the warning or not and, therefore, within a few seconds there was a bump; the cars coupled and the switching crew then moved away from the scene and as they were leaving a man came up and told them Hale had been pinned under the car. The switching crew thereupon backed to the scene of the accident and moved the car from Hale's leg. He was taken from under the car and on the road to the hospital died."

To this statement should be added the testimony of the witness Shadow for appellee, that after the two cars were set down on the first track, very close to the loaded cars, Hale said to Shadow; "I cannot use them there," and Shadow replied, "I know you can't; I am going to back that one out there and shove the other two down to you." Other witnesses testified that just before the cars bumped Hale was climbing up on top of the cars. To be exact, Shadow testified as abstracted as follows: "I was going back towards the cars when I told him we were coming in right away, and to get his teams out of the way. Then we put the two cars in on No. 4. After that we kicked two cars on No. 2 and then I hollered, 'Look out, we are coming right now.' At that time I was on the car coming in on No. 2 track. Before we put the two cars in on

No. 4 first, I was talking with Hale; told him that we were coming in right now and he said, 'all right, shoot,' and then started back toward the teams. Then he kicked them in on No. 2. The cars coming in on No. 4 rolled within a few feet of the two cars on which Hale was working and then I rode the car in on No. 2 track. I climbed on top of that car and set the brake because it was down hill there. I had just started to climb down from the car when I said, 'look out, Hale, they are coming right now.' I hollered as loud as I could. I should judge from the time that they kicked the car on No. 2 until they were backing in on No. 4 it was probably two or three minutes. When I hollered Hale was about thirty feet away from me and about thirty feet from the car which he was loading. He was standing there when I hollered, 'look out, boys, they are coming.'

On the former trial, in the record as a part of Shadow's testimony and prominently in the abstract, the witness appeared to testify: "I didn't tell him we were going to come back and push the cars in after we were there the first time. I just told him we were going to come in there. We put the two cars in. I didn't tell him anything further." This was on cross-examination and did not at all represent the substance of the talks between Shadow and Hale during the switching period. It may have represented the exact language used at one particular point of time. Hale knew he could not use the two cars where they were first set on Track No. 4 and was told by Shadow that they (the train) were coming in again to pull out a loaded car and set these two empties farther down so they could be used. Even when the train was moving down on track four the second time to pull out the loaded car and Shadow called to him from track two, where he was leaving a car, Hale was thirty feet from the car upon which he was injured, and it was for the jury to say whether the warning then given him by

Shadow was a proper and sufficient warning and whether Hale was in the exercise of due care in his own behalf. The proof is presented in different form in this case from the proof presented in General No. 8025. The statement in the opinion on the former hearing of this case—"They did not tell Hale they would come back and push forward the cars on track four after they first put them in. Shadow told him after putting the cars in, 'we are ready to go' and he said he couldn't get at them. 'I told him we were going to move them in, then we put the two cars in, I didn't tell him anything further.'' This information was given after the engine had been detached from the two empty cars and while it was engaged in other work''—is not warranted by the proofs as presented in the testimony on the present hearing.

Based upon this state of the proof, appellant strenuously contends that special notice or warning must be given a shipper or shipper's employes, who are unloading cars on a railroad sidetrack, before said railroad shall run or back a train in on said sidetrack, while said cars are being loaded or unloaded, citing **The Chicago and Northwestern Railway Company v. John Goebel,** 119 Ill. 515, where it is held: "No one has the right, by his course of dealing or otherwise, to invite confidence, and lull another into a feeling of security from the consequences of his own acts, and then, when an injury has resulted to him from simply acting upon the confidence thus inspired, to turn round and say, 'You should have looked out for yourself, and paid no attention to what I said or did.' When a railroad company puts loaded cars upon a sidetrack, for the purpose of being unloaded by the owners of the freight, and such owners, their agents or servants, with the express or implied consent of the company, proceed to remove the freight, the company, in such case, has no right, without special notice and warning, to run or back a train in upon the sidetrack while the cars are being unloaded. And while, in such case, those engaged in the work of unloading are not permitted to close their eyes or ears to

what comes within the range of these senses, yet they may give their undivided attention to their work, and are justified in assuming that the company will not molest them, or render their position hazardous, without such notice or warning. That such is the law, is well settled by authority. **Rolling Mill Co. v. Johnson,** 114 Ill. 57; **Railroad Co. v. Hoffman,** 67 id. 287; **Newson v. New York Central Railroad Co.** 29 N. Y. 383; **Stinson v. Stinson,** 30 id. 333; **Noble et al v. Cunningham,** 74 Ill. 51; Thompson on Negligence, 461; Pierce on Railroads, 275, 276." Appellant insists, in view of this principle, that the court erred in various instructions to the jury.

It is also the law of this State, as stated by Mr. Justice Dibell in **R. I. & P. Ry. Co. v. Dormady,** 103 Ill. App. 130, as follows: "We cannot hold it to be the law that a railroad company in doing switching in its freight yards, or in freight yards with which it is connected, must avoid striking standing freight cars, and aware of the approach of moving cars, the railway company must see to it that such men get off before the moving cars are permitted to strike or bump again the stationary cars. On the other hand, men at work on freight cars in such yards, and who know that in the customary method of switching there the cars do strike together, and that the force may overcome their natural equilibrium, and who see that switching is being done, and that such striking is about to occur, are required to protect themselves from danger, and if they do not, they assume the risk. Men are continually on and about cars while switching, is going on in railroad yards, and they assume the ordinary and known risks of that business when conducted in the usual and customary manner."

The same rule was laid down in **Belt Ry. Co. of Chicago v. Manthei,** 116 Ill. App. 334, where the court say: "**McInerney v. Delaware & Hudson Canal Co.,** 151 N. Y. 411, is a case very similar

to this. In that case, as in this, the defendant company was moving cars from the private yard of a company, which were on tracks in the yard. The plaintiff was between two of the cars, when the engine crew of the defendant company backed down the engine, by reason of which the cars were forced together, and the plaintiff was caught between the bumpers of the cars and injured. The owner of the yard had been notified by the engine crew that they were ready to move the cars, but there was no notice by the owner of the yard, or by anyone, to the plaintiff. There was no evidence that any of the engine crew even knew that the plaintiff was at work between the cars. The trial court non-suited the plaintiff, and the Court of Appeals affirmed the judgment." Under the proofs and the instructions of the court it was for the jury to say whether the deceased was warned or specially warned or was in the exercise of due care in his own behalf.

The first complaint as to instructions by appellant was that the court struck out certain words of the following instructions:

"You are instructed that the only care and caution required of Charles Hale was such conduct and care and caution for his own safety as a reasonably prudent and cautious person would have exercised under the same or similar conditions and circumstances which surrounded him before and at the time of the alleged accident. He was not required to exercise extraordinary care or diligence." The court struck out the word "only" and the words "He was not required to exercise extraordinary care or diligence." We can see no error in this regard.

Appellant deems the modification of the next instruction more serious. The instruction was as follows: "The court instructs the jury that if you believe from a preponderance of the evidence that Charles Hale was in the exercise of reasonable care and caution for his own safety before and at the time of the injury and that his injury and death was occasioned by the negligence and

careless acts, conduct and omission of the defendant's employes to warn and notify Charles Hale before backing railroad cars into and against the car upon which Hale was working, then you shall find the defendant guilty." The court struck out the words, "To warn and notify Charles Hale before backing railroad cars into and against the car upon which Hale was working." The court submitted the issue of "warning" to the jury for appellant in the following instruction: "The Court instructs the jury that if you believe from the evidence that,

"Charles Hale was in the employ of the Lincoln Park Coal and Brick Company on January 14, 1925, and if you further believe from the evidence that,

"Charles Hale was on that date engaged in work for the Lincoln Park Coal and Brick Company requiring him to be upon coal cars on the tracks of the defendant, and if you further believe from the evidence. that,

"Charles Hale was on the cars placed on the side track of the defendant company and was engaged in the business of his employer, the Lincoln Park Coal and Brick Company and if you further believe from the evidence that,

"Charles Hale at the time and place aforesaid was exercising due care and caution for his own safety, and if you further believe from the evidence that,

"Employes of the defendant railroad backed a car or cars onto the same track upon which the car upon which Mr. Hale was standing and bumped said cars into the car upon which Mr. Hale was standing, and if you further believe from the evidence that,

"The employes of the defendant company failed to tell Mr. Hale that they were going to place these cars upon the said track and otherwise failed to give him warning thereof at the time the cars were backed into the car upon which Mr. Hale was standing, and if you further believe from the evidence, that,

"The backing of the cars into the car upon which Mr. Hale was standing was the proximate cause of Mr. Hale's death, and that plaintiff has been compelled to pay compensation on account thereof,

"Then you shall find your verdict for the plaintiff and assess your damages against the defendant at such sum or sums as you believe from the evidence the plaintiff to have sustained."

The court struck out from this instruction the word "standing" three times and the words, "and otherwise failed to give him warning thereof," and the words, "and that plaintiff has been compelled to pay compensation on account thereof." The striking out of the word "standing" was not of importance as the testimony was not at all definite as to the position of deceased in relation to the car, and as to the other words "and otherwise failed to give him warning thereof" stricken out, could not have been to the disadvantage of appellant for the reason that no notice or warning is claimed to have been given to the deceased of the transfer of the cars, except the statements made to him and the movements of the cars and train. The issue is made squarely in this instruction as to whether deceased was told or advised of the movements of the cars and train, and that was the real issue in the case.

A good deal is said in the briefs about a "special warning" and that deceased was entitled to a "special warning" of the movements of the cars and train in connection with the cars upon which deceased was working, but no instruction was asked of the court, by appellant, defining what was or is meant by the term "special warning," and no light is thrown upon that subject in the briefs. Some light is thrown upon this subject by one of the instructions given for appellee, the substance of which was: "That if Charles T. Hale knew that the defendant was switching cars in the vicinity of the sidetrack in question and that defendant intended to place additional cars upon said sidetrack for

Charles T. Hale and those working with him to load coal into, and if you further find that a switchman of defendant gave a warning to Hale that the cars were moving on the sidetrack just prior to the accident, and that Hale heard said warning or in the exercise of due care and caution for his own safety could have heard said warning, and that said warning was sufficient to warn Hale of the last movement of the cars in question, and that Hale failed to heed said warning," etc., and by an instruction offered by appellant and refused, as follows: "That it was the duty of the defendant's employes to notify Charles Hale before they started to move cars in and upon the track occupied by the car upon which Mr. Hale was working," etc., which was refused because the substance of the instruction had already been approved and given for appellant, as herein set out. Did Hale have notice and know what was going on or, in the exercise of due care, should he have known from the notice given, was the full substance of the issue and upon this subject the jury were properly instructed.

The last two instructions fully informed the jury as to the real issue in the case for each respective party, were mandatory instructions and directed a verdict, and upon the proofs we find no error in the giving of either or the modification of the first. In the view of this court the proofs and the instructions fully covered the issue of "special notice and warning," discussed in **C. and N. W. Ry. Co. v. Goebel, supra**, and appellant's refused instructions omitted necessary elements in the case or were covered by other instructions.

As to the court's refusal to submit to the jury the question of compensation and the amount thereof, of which appellant complains, this is to be considered together with certain cross errors presented by appellee. Appellee presented cross errors, based upon the error charged that the court did not charge the

jury to find a verdict for the appellee. It is charged that appellant presented no proofs to the jury as to the contract with the United States Fidelity and Guaranty Company, did not present its policy and did not prove that Hale left any surviving widow, children or next of kin, and did not show the appointment of any administrator, to whom only the action might accrue and to whose rights only appellant could be subrogated, all of which allegations were material in the declaration and should have been proven. Appellant's answer to these cross errors charged is that the plea of the general issue raised an issue only as to the injury and damage, and it was not required to make the proof on the allegations of inducement contained in the declaration. If that position is correct, it would apply equally to the award of the Industrial Board and the amount of the compensation. In such case the action would be merely for damages, the verdict to be subject to the control of the court and not to exceed the award for compensation. As to all these questions, we do not deem it essential to a decision of the case that we pass upon any of them.

It is apparent on reviewing the record of this case and comparing it with the record of the same case in 1926 that an entirely different case has been presented to this court from the record presented in General No. 8025. In the statement of the case by appellant to this court, all of which we quote, it is stated and reiterated: "The facts as appear in the record on the trial of this case are practically identical with the testimony given on the first hearing." * * * "There is little or no controversy in the testimony. The facts in this case are identical with the facts appearing before this court at the October term, 1926," yet, when in our original opinion we pointed out the differences in the cases as presented to this court, counsel in their petition for a rehearing say: "We have shown your Honors

that there was no such testimony by Shadow, at the former trial, and in addition have shown that his testimony at the first trial was exactly opposite of his testimony at the second trial. This Court could not have been misled as stated in the opinion, and we assume the Court will promptly correct this portion of the opinion irrespective of the disposition made of this petition for rehearing."

We point this out merely to show the possibilities of counsel occasionally to commit error as well as the court's proneness ever.

Finding these matters in the case and not having the record in 8025 before us, with appellant's statement that the testimony was identical in the two cases, we concluded it was a variation in the abstracting of the two cases. Upon now examining both records it is fair to say that the testimony of Shadow was brought out much more fully on the last trial and was fully abstracted in this cause by a supplementary abstract by appellee. We cannot say from a full review of the case that the witness Shadow testified differently than he did at the first trial, but it was more complete, and inasmuch as counsel request us to correct the former opinion written we cheerfully do so and we have set out these matters to try and make it plain why the conclusion of the court in this case is different from the conclusion in **Lincoln Park Coal and Brick Co.**, plaintiffs in error v. **Wabash Railway Co.**, defendant in error, General No. 8025, 246 Ill. App. 632, which was presented more fully and in a different manner.

In the view of the case taken by this court, on the proofs submitted on the question of injury and damages, we find no error that would warrant a reversal, and the judgment of the Circuit Court of Sangamon County is affirmed.

Affirmed.

Upon petition for rehearing, opinion modified and conclusion adhered to.

(Abstract)
Completed 2-4-1931

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263 I.A. 665

General No. 8511 Agenda No. 9

April Term, A. D. 1931

JOSEPH HOSKINS, Appellee,

vs.

FRANK HEAVNER, Appellant.

Appeal from the Circuit Court of Pike County

SHURTLEFF, J.

Appellee instituted this action in Pike County against appellant for malicious prosecution, charging appellant with having signed and sworn to a criminal complaint and causing a warrant to be issued for the arrest of appellee in Pike County in the month of August, 1930. The complaint was based upon section 568 of chapter 38 (Smith-Hurd's Rev. Stat. 1929) for knowingly and willfully, without color of title made in good faith, cutting timber upon the lands of appellant, without the consent of the owner. Appellee was arrested and taken before a justice of the peace at Pittsfield in Pike County. The cause was twice continued before the examining magistrate. Upon the last hearing, September 16, 1930, appellee produced a copy of the Session Laws of 1821, first establishing Pike and Greene Counties, and from all the information that could be obtained, it seemed that the boundary line between the two counties was the center line of the Illinois River and the lands in question upon which the timber was standing, lying to the east of said line upon an island in said river, in Green County, the examining magistrate dismissed the cause for lack of jurisdiction.

There was a verdict against appellant in favor of appellee in the sum of one thousand dollars, which, upon remittitur in the sum of five hundred dollars, was entered in judgment for the sum of five hundred dollars against appellant, and the record is brought to this court by appeal for review.

Upon the trial of this cause in the Circuit Court of Pike County appellant produced a patent from the United States Government, based upon a survey of the lands in question. Appellee testified he owned the lands but produced no color of title. The land itself was in the original bed of the Illinois River and had been formed by accretions and possibly by the shifting of the bed of the stream. Portions of the land were frequently covered with water in high water periods. Appellant's patent and title did not indicate whether the lands were in Greene or Pike counties and before the matter was investigated there seemed to be more or less difference of opinion as to just where the boundary line between the two counties ran.

Appellant assigns error upon the giving of appellee's third instruction as follows:

> "You are further instructed that even though you may believe the defendant sought legal advice, yet if it appears from the evidence that said defendant did not fully disclose all the material facts, or concealed the same, from the attorney, he would not be acting in good faith in the matter, and the advice he received under such circumstances would not avail him as a defense."

This instruction required appellant to furnish the state's attorney with all the material facts to show good faith whether such facts were within the knowledge of appellant or not. Surely the state's attorney should have had a greater knowledge as to the boundary lines of Pike County than appellant. The instruction was error.

Appellant further assigns error upon the giving of appellee's fifth instruction, which was as follows:

"You are further instructed that if you believe from a preponderance of the evidence in this case that the defendant, Frank Heavner at the time of swearing to the complaint and causing the issuing of the warrant testified to by the witnesses, had no probable cause to believe that the plaintiff, Joseph Hoskins, had committed ac crime in Pike County, Illinois, then you are at liberty to find that said prosecution is malicious as charged in the declaration."

This instruction either is not based upon any testimony in the case or is error. In other words, it informs the jury that appellant should have made an independent investigation and determined that the lands lay in Pike County, otherwise the action was malicious. The instruction ignores the right of appellant to rely upon the judgment of the State's attorney as to the boundary lines of the counties. This instruction should not have been given.

Appellant assigns error upon the giving of appellee's tenth instruction, which is as follows:

"The burden of proof is upon the defendant Heavner, to prove that he sought counsel with an honest purpose to be informed as to the law, and that he was in good faith guided by such advice in causing the arrest of the defendant, and whether he did so is a question of fact to be determined by the jury; and unless you believe from the preponderance of the evidence in the case that the defendant did so act, you should find so by your verdict on the part of the defense in this case."

This instruction places the burden of proof of the whole case upon appellant and was error. (**Glenn v. Lawrence**, 204 Ill. App. 411; affirmed 280 Ill. 581; **Luthmers v. Hazel**, 212 Ill.

App. 199.)

Other errors are pointed out but doubtless upon another trial they will be eliminated. For the errors pointed out the judgment of the Circuit Court of Pike County is reversed and the cause remanded.

Reversed and Remanded.

Opinion filed [illegible]

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263 I.A. 665

General No. 8516 Agenda No. 13

April Term, A. D. 1931

WILLIAM P. DUNN, Appellee,

vs.

THE PAUL BROTHERS AMUSEMENT CO., Incorporated, Appellant.

Appeal from the Circuit Court of Macoupin County

SHURTLEFF, J.

Appellee filed a declaration in assumpsit consisting of the consolidated common counts, and the ad damnum was placed at nine hundred and ninety-nine dollars. To this declaration the appellant filed a plea of special contract and payment.

On leave granted, the appellee filed an amended declaration and later an amendment to the original declaration changing the ad damnum from nine hundred and ninety-nine dollars to two thousand dollars. The appellee's theory is that he had been employed to rebuild the theater building in Carlinville, where one had burned, for the appellant, and there was no specific contract; that he was just directed to go ahead, employ men, do the work, boss the job, etc. The appellant's theory was that they did make a specific contract concerning the erection of said building; that Mr. and Mrs. Paul, for the appellant, employed the appellee to build the theater building, employ the men, act as boss, etc., with the understanding that he carry compensation insurance and as pay he was to receive a journeyman carpenter's wages.

There were several contractors in the locality who testified that in cases of employment of builders without a specific contract they were entitled to commissions on some parts of the labor employed.

The case was tried without a jury. The court found the issues for the appellee and assessed his damages in the sum of $1465.61. Appellant contends that the court erred in finding the issues for the appellee.

Mr. Paul testified that appellee stated at that time that he could employ labor cheaper than the appellant, and the evidence shows that he could employ carpenters at ninety cents an hour, whereas appellant would have to pay, should he employ them himself, one dollar and five cents an hour. This testimony is corroborated by the witnesses Everett Dunn and Theodore Raab. He further states that it was agreed that he was to furnish and pay for all the material used; that appellee was to supervise the building, employ all help, furnish the equipment used in the erection of the building and carry his own insurance on the workmen. He was to receive a regular journeyman's wage for himself for all time he was actually engaged in and about the building, and that at the end of the week he was to furnish to Paul, a statement, showing the price for labor on the building. Paul was to pay these bills as the work progressed and they were furnished. Mrs. Paul, who was present when this agreement was made and participated in the making of it, testified that such was the contract.

There can be no question but that appellee did commence the construction of the building, and did employ all the men who worked thereon, although he did not know how many men worked on the building. About the end of the first week, when the time for the first payment was to be made, appellee told Paul that he did not have the money to pay off the men, and he wrote out the checks and Paul signed them and paid the men for that week's work. This is shown by the checks offered in evidence. After that first payment Paul, about every week or two weeks thereafter, gave a check on behalf of the company to appellee in large sums of money. Although

appellee had agreed to furnish a statement showing the amount to be paid at each time, he never furnished any such statement, but had a book which he exhibited to Paul on these occasions; and from this book the amount of the check was taken and Paul paid the amount indicated in the book shown to him by appellee. This book was in the custody of appellee all the time, as the evidence shows, but he failed to produce it at the trial, and no excuse or reason was offered as to why he did not produce it in court. If the book was at home, as he testified, he had the opportunity to get it during the noon hours of the trial, but he sought to rely on a book which his attorney stated to the court was not a book of original entries, but some sort of a journal which he kept.

Appellant introduced checks, which were offered in evidence in the case, showing the total sum of money paid by him, in all about $10,543. The only basis upon which these checks were paid was the statement in this day book which was exhibited to him by Dunn at the time each payment was made. The last of these checks given by the appellant to the appellee, was on January 28, 1928. At that time the building was completed. This last check was marked "in full," and was in the sum of $120.80. After the building was completed, no further work was done by appellee until later in the summer when he was employed to construct a fan or ventilator in the building. This check for $61.80 was for this work, which was entirely separate and apart from the construction of the building and was done long after the building was completed. The appellee employed some men who did part of the work, and Paul employed at least one man on the job. The appellee, on November 16, 1928, presented to Paul a bill in the sum of $61.80 for this work, and a check was given to him for said amount and receipted in full. This bill is offered in evidence and is an exhibit in the case. Appellee testified he never cashed this check for $61.80.

There was a finding and judgment in behalf of appellee and against appellant in the sum of $1465.61 and appellant has brought the record to this court; by appeal, for review.

There was a direct issue of fact in this case, whether the work was done under a specific contract or under the **quantum meruit.** The work was completed as early as January, 1928, and no demand was made for any specific additional payment or suit commenced until two years later. Upon the completion of the building of the theater a bill was presented and paid by check in the sum of $120.50 which was marked "in full' and indorsed by appellee. No explanation was made of this check by appellee, so far as we can find in the record. Appellee in his first declaration claimed to recover $999. Later the **ad damnum** was raised to two thousand dollars. Paul and his wife, officers of appellant, testified that appellee agreed to employ the help and oversee it and charge only the wages of a journeyman carpenter. Appellee denied this but had no corroborative proof. Paul testified that at the end of the week or a period, appellee would present a day book, having in it the name of the workmen, the labor figured at $1.05 an hour and including the charge for equipment and insurance furnished by appellee, and upon the presensation of this day book and account appellant paid each week or period the full amount of the bill. It seems to be agreed or understood that there is a custom among carpenters and other employes that the master workman is entitled to a commission upon the pay of other workmen, which with carpenters at that time amounted to fifteen cents an hour. It is denied that this custom exists among masons. Paul testified that the day book and statements presented, which appellee retained, showed that the carpenters were paid $1.05 an hour. Appellee now insists he only paid and presented to appellant for payment the work of the carpenters at ninety cents an hour, and that he presented no bills for the

use of equipment and the cost of insurance, the items for which appellee has brought this suit. The testimony along this line is not at all satisfactory. Appellee for proof did not present the original day book or statements which he had retained, but presented another book called a "journal," which he claimed and testified was a copy. This was objected to and the following colloquy took place while appellee was on the witness stand:

Q. "You have his book, have you?

A. "My books are all the same. My day book is just like this. Then I take it from this book and put it on this one.

Q. "Where is the one that had the Paul account in it?

A. "Well, I don't know where it is. I guess it is at home.

Q. "Could you furnish it?

A. "I got this book just the same.

Q. "That book wouldn't show the men that worked and were paid?

A. "Oh, yes, it is right here.

Q. "You transferred it to another book?

A. "I might have other jobs on that same book.

Q. "Did I understand you to say you could furnish that book?

A. "Oh, I guess I could. I guess I got it at home.

Q. "It was the book that you presented to him when he made the payments?

A. "Yes, sir, Saturday evenings.

Q. "That is the book we would like for you to furnish."

Appellee never furnished the books in question.

At another time when appellee was on the witness stand, on cross-examination he testified:

Q. "Can you tell us what he owes you now, on the labor you had employed?

A. "Yes, sir, $1465.61.

Q. "That is all labor is it?

A. "That is partly labor. That is for my equipment and for my compensation insurance and for myself.

Q. "Now let's get it right. How much of it is for labor?

A. "I would have to go over the whole books to give you that."

Mr. Peebles, counsel for appellee: "I will go over the books and make up a bill of particulars."

Mr. Vaughn: "That is all right."

Later, before the case closed, a pretended bill of particulars was presented in the following form:

Plaintiff's Bill of Particulars:

Carlinville, Illinois, ...19...

M Paul Amusement Co.

In Account With

WM. P. DUNN

Contractor and Builder

Total balance due $1465.61

Made up of these items:

Insurance premiums & policy		297.80
10 percent on masons and laborers, including use of equipment	614.00	
10 percent on carpenters, including equipment	553.81	
		1465.61

but the original day book was never presented. Certain sheets from the so-called "journal" were presented showing the names of carpenters with their time figured at ninety cents an hour.

Appellee was sued by the insurance company and a judgment recovered against him for the sum of $247 for the coverage on this job. Mrs. Paul testified that after this suit was brought she called appellee on the phone and inquired why he had brought the suit, and stated that appellee said: "He said it was Frank's (Paul) fault, because he had told the insurance men what it was going to cost and it seemed to be spite work. He did say he told

Frank to keep his mouth shut and not tell the insurance people what the theater cost.'' This testimony is not denied by appellee and it is corroborative of appellant's theory of the contract. The burden of proof in this case is upon appellee to establish his claim. (**Howard v. Bennet,** 72 Ill. 297; **Bonnell v. Wilder,** 67 id. 327.)

From all the proofs submitted and from the proofs in appellee's hands not submitted, appellee, in the opinion of this court has failed to sustain the burden of proof by a preponderance of the evidence, and it is therefore the opinion of this court that the judgment of the Circuit Court of Macoupin County should be **reversed.**

Judgment reversed and cause remanded.

Abstract

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263 I.A. 665

General No. 8535 Agenda No. 27

April Term, A. D. 1931

ELIZA HAMM, Administratrix of the Estate of Oscar Hamm, Deceased, Appellee,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, Appellant.

Appeal from the Circuit Court of Morgan County.

SHURTLEFF, J.

This was an action in assumpsit brought by Eliza Hamm as administratrix of the estate of Oscar Hamm, deceased, against the Metropolitan Life Insurance Company, claiming the sum of four hundred and forty-eight dollars under a life insurance policy issued by the defendant on the life of one Oscar Hamm, deceased husband of the plaintiff.

The declaration was in one count. It alleged the execution of the policy on July 30, 1928, insuring Oscar Hamm in the sum of four hundred and forty-eight dollars, and setting forth the material terms and conditions of the policy. It further averred that the said Oscar Hamm died on September 25, 1928, and that on September 27th appellee gave appellant notice and furnished proofs of death, etc., and that appellant refused to pay appellee the policy, etc. Among the conditions contained in the policy and set forth in the declaration are the following: "If (1) the insured is not alive or is not in sound health on the date hereof, or if (2) before the date hereof the insured * * * has within two years before the date hereof been attended by a physician for any serious disease or complaint, or before said date has had any * * * disease of the heart * * * unless such rejection, medical attention or previous disease is specifically recited in the 'space for endorsements'

on page four in the waiver signed by the secretary * * * then in any such case, the Company may declare this policy void and the liability of the Company in the case of any such declaration, or in the case of any claim under this policy, shall be limited to the return of premiums paid on the policy except in the case of fraud, in which case all premiums will be forfeited to the Company." There was no waiver endorsed on page four.

The appellant filed four pleas. The first plea was non assumpsit. The second plea set up the condition (1) above, and averred that Oscar Hamm on the date of the policy was not in sound health and that the policy became void, etc. The third plea set up the provision of the policy concerning the attendance by a physician within two years before the date of the policy, and averred that Oscar Hamm had been within two years before the date of the policy attended by a physician for a serious disease and complaint, and that such attention was not specifically recited in the "space for endorsements" on page four, etc., and that the policy became void. The fourth plea set forth the condition of the policy as to the insured having had a disease of the heart, and averred that Oscar Hamm before the date of said policy had had a disease of the heart, and that said disease was not specifically recited in the "space for endorsements," etc, and that the policy was void.

Meanwhile appellant tendered into open court four dollars as return premiums, which tender was refused and said sum deposited with the clerk of the court.

The replications to the special pleas on which the case went to trial were as follows: Replication to the second plea averred that Oscar Hamm was in sound health and therefore the policy did not become void. The replication to the third plea averred that the appellant through its agents was informed and had knowledge of the attendance on the decedent by a physician for the supposed

disease and complaint in said plea alleged, and that notwithstanding such information, the appellant issued and delivered the policy and received and accepted the weekly premiums until the 24th day of September, 1928, and that by such acts and conduct, while in possession of the information and knowledge aforesaid it waived its right to declare the policy void, and the policy did not become void, etc. The replication to the fourth plea averred that Oscar Hamm before the date of the policy had not had a disease of the heart, and the policy did not become void, etc. A demurrer was filed to the replication to the third plea, but was withdrawn and the appellant filed a rejoinder, averring that the appellant was not by its agent informed nor did it have knowledge of the attendance on the decedent by a physician for the disease and complaint in the appellant's plea alleged; that it was not in possession of the information and knowledge and did not waive its right to declare the policy void.

The case was tried at the May term, 1930; verdict rendered for the appellee, which, on motion of the appellant, was set aside.

Another trial of the case was had on November 13, 1930. On this trial letters of administration of the appellee, and the policy were introduced in evidence, and the evidence proved the issuance of the policy and the payment of the premiums; the death of Oscar Hamm and notice to appellant's agent, Finley. There was a verdict and judgment for appellee in the amount of the claim and appellant has brought the record to this court, by appeal, for review.

The evidence discloses that letters of administration of the estate of Oscar Hamm, deceased, were duly issued by the Probate Court of Morgan County, Illinois, to the appellee, Eliza Hamm, and that she was then the duly qualified and acting administratrix of said estate; that the policy sued on was duly executed and delivered to Oscar Hamm during his lifetime; that the conditions precedent and subsequent to the suit thereon had been performed;

and that appellant had not paid the amount of the policy nor any part thereof. The evidence further discloses that appellant's agent, Finley, told appellee at the time he took the policy from the appellee for the purpose of sending same to the appellant company, that the insurance would be paid and that thereupon the appellee delivered to Finley the policy and premium receipt book for the purpose of permitting the agent, Finley, to send the policy and receipt book in and to the appellant for payment thereof.

The evidence further shows that appellant's agent, Finley, and another agent of appellant whose name appellee did not know, called upon appellee to procure information relative to the decedent's having had heart trouble and that upon that occasion the agent accompanying Finley told the appellee that "he had got some information on that and they had to refuse to pay the claim on that account."

The evidence further proves that Frank Reed, on the day appellant's agents took decedent's application for the policy of insurance sued on, was present and heard the conversation had between the decedent and appellant's agents relative to the condition of his health at that time, and that he, Reed, heard the decedent tell the agent that he, the decedent, was in no condition to take any examination of any doctor on account of having had the flu which left him, the decedent, with a weak heart and that appellant's agent Finley, told the decedent that he would not have to take any examination for a policy in the amount of the policy sued on; that there was going to be no doctor's examination.

The evidence further discloses that Dr. Edward Bowe, a physician, treated the decedent during his last illness from August 27, 1928, until a short time prior to September 25, 1928, the date of his death, and that the decedent was suffering from aneurism of the aorta, which illness caused his death; that he examined decedent with a fluoroscope, which examination disclosed that decedent had aneurism of the aorta; that decedent's chest was

normal aside from this aneurism; that decedent's heart was normal in size and but for this aneurism was in normal position; that the aneurism of the aorta caused bruit, a loud blowing sound, which sound may be similar to the sound made by a leaky heart valve, and that this bruit was the only sound within the chest of the decedent at that time; that aneurism of the aorta is not a disease of the heart; that persons suffering from it would have similar symptoms to a person suffering from heart disease; that it would not be possible to determine positively whether a man was suffering from aneurism of the aorta or from heart disease without a fluoroscopic examination; that X-ray is the final and only positive way to determine the size and position of the heart conditions; that by the use of the fluoroscope one can see the shadow of the movement or outline of the organs of the body; and that X-ray pictures of the decedent were taken at the hospital by the Sister in charge who was an experienced operator of X-ray machines and that the machine by which said X-ray pictures were made was in good working condition; that the X-ray picture, P-3, which was admitted in evidence, showed the dilated aorta to be larger that the heart itself; that the heart was slightly enlarged but not unusually so, and was slightly displaced by the size and crowding of the aorta, the aneurism of which was the cause of decedent's death.

The evidence of Dr. Cole, defendant's witness, proved that he, Dr. Cole, did not know that the decedent was suffering with an aneurism of the aorta but that he thought that decedent's ailment was leaky heart valves; that the reason that Dr. Cole did not know decedent had aneurism of the aorta was because he had never X-rayed him; that he did not attend decedent during his last illness and that he did not examine decedent's body after death.

The evidence further shows that appellant's agent, Finley, was present at the time the policy sued on in this case was applied for,

but that Finley did not see Frank Reed at Hamm's residence on that occasion; and that according to Finley's recollection nothing was said in regard to Hamm's having had the flu and having had a weak heart; that such statement might have been made without his knowledge because he, Finley, was not there all the time that the conversation was going on; that he had authority to solicit insurance promiscuously and to receive and deliver policies of insurance and to receipt for premiums.

The evidence of L. G. Chandler, one of appellant's agents, shows that he, Chandler, did not see the witness Reed at the residence of decedent, nor recall his presence nor the presence of his car out in front at the time of the making of the application for the policy in question. The evidence further discloses that appellant's agent Chandler looked the decedent over pursuant to his duty and satisfied himself that the decedent was an acceptable risk.

There is some contention in the briefs as to the meaning of the language—"may declare this policy void," in the policy of insurance. The question of avoidance was immaterial. The condition limited the liability of the insurer to a return of the premium, if claim was made on the policy and the insured was not in sound health at the date of the policy; or, if before the date of the policy, the insured had within two years been attended by a physician for any serious disease or complaint or before said date had had any disease of the heart. **Souze v. The Metropolitan Life Ins. Co.** Mass, 170 N. E. 62.

Appellant complains of the giving of various instructions in this case. We shall not recite all of them. Appellant's second plea raised the issue that deceased was not in sound health at the date the policy was issued, and appellee replied that the deceased was in sound health upon that date. Nevertheless, the court

gave appellee's third instruction as follows: "You are further instructed that if you believe from the evidence, that the insured, Oscar Hamm, deceased, was, on the date of the policy sued on in this case, suffering from illness or lack of soundness of health, and if you further believe from the evidence, that such illness or lack of soundness of health existed at the time of the delivery of the policy; and if you further believe, from the evidence, that the defendant's agent, when delivering said policy, knew of such illness or lack of soundness of health, then and in such event, the defendant thereby waived its right to declare the said policy void because of unsound health of the insured."

In the pleadings there was no issue of waiver raised upon appellant's second plea, and the jury should not have been so instructed. The issue of waiver was raised only upon appellant's third plea. Still other instructions were given of a similar nature as to the other pleas than the third plea, and this was error. The issue of waiver cannot be raised unless it is pleaded. The same error was committed in a part of appellant's instruction as modified by the court.

For the error in instructions, the judgment of the Circuit Court of Morgan County is reversed and the cause remanded for another trial.

Reversed and remanded.